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No.

In the
Supreme Court of the United States

OCTOBER TERM 1993

RAYMOND J. PATRIARCA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED FOR REVIEW

Whether under §1B1.3 of the United States Sentencing Guidelines a RICO defendant's guideline offense level and, correspondingly, his sentence, may be mandatorily increased based upon conduct which is charged as a predicate act of racketeering only as to a RICO codefendant or which is not charged as a predicate act of racketeering against any defendant, or, rather, whether, §1B1.3 may be applied only to the predicate acts of racketeering charged against the defendant.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 5

Opinions Below 8

Jurisdiction 8

Constitutional, Statutory, and United States Sentencing Guidelines Provisions Involved 9

Statement of the Case 14

Reasons Why the Writ Should be Granted 22

I. THE CONSTRUCTION OF THE GUIDELINES ADOPTED BY THE FIRST CIRCUIT IS INCONSISTENT WITH A PROPER TEXTUAL ANALYSIS OF THE GUIDELINES AS A WHOLE AND WITH THEIR UNDERLYING POLICIES AND PURPOSES 26

A. RICO is a Multi-Object Offense And Is, Therefore, Subject to U.S.S.G. §1B1.2(d) 28

B. The Guidelines Construction Adapted by the First Circuit is Inconsistent with the Policies and Purposes Underlying the Guidelines 43

1. Charge Offense v. Real Offense 43

2. Administrative Unwieldiness 51

CONCLUSION 53

APPENDIX following page 53

TABLE OF AUTHORITIES

Case	Page
Pinkerton v. United States, 328 U.S. 640 (1946)	32
United States v. Ashman, 979 F.2d 469, 485 (7th Cir. 1992), cert. denied sub nom. Barcai v. United States, 114 S. Ct. 62 (1993)	37
United States v. Hahn, 960 F.2d 903 (9th Cir. 1992)	44
United States v. Lanni, 970 F.2d 1092 (2d Cir. 1992)	34
United States v. Masters, 978 F.2d 281 (7th Cir.), cert. denied, 111 S. Ct. 2019 (1991)	41
United States v. Neapolitan, 791 F.2d 489, 504 n.7 (7th Cir. 1980), cert. denied, 479 U.S. 940 (1986)	32
United States v. Patriarca, 776 F.Supp. 593 (D. Mass. 1991)	16
United States v. Patriarca, 807 F. Supp. 165 (D. Mass. 1992)	21
United States v. Patriarca, 948 F.2d 789 (1st Cir. 1991)	16
United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir.), cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983)	37
United States v. Rivers, 917 F.2d 369 (8th Cir. 1990)	48

Constitutional, Statutory, and United States Sentencing Guidelines Provisions

Due Process Clause, Fifth Amendment, United States Constitution 45

18 U.S.C. §371 14

18 U.S.C. §1254 8

18 U.S.C. §1952 14

18 U.S.C. §1961 29

18 U.S.C. §1962 14

U.S.S.G. §1B1.2 . . . . . 28, 38

U.S.S.G. §1B1.3 . . 2, 17, 24, 26, 33,44

U.S.S.G. §2E1.1 . 20, 24, 26, 36, 38, 40

U.S.S.G. §4A1.3 16

U.S.S.G. §5K2.0 15

U.S.S.G. Part D 35

Other Authorities

Breyer, The Federal Sentencing Guidelines and the Key Compromises On Which They Rest, 17 HOFSTRA L. REV. 1, (1988) . 43

Wilkins & Steer, Relevant Conduct: The Cornerstone of the Sentencing Guidelines, 41 SO. CAR. L. REV. 495 (1990) . . . 34

Most Frequently Asked Questions About the Sentencing Guidelines, Vol. VI, Dec. 1, 1992 37

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Petitioner Raymond J. Patriarca prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on September 16, 1993.

Opinions Below

The opinion of the First Circuit Court of Appeals is reported at 4 F.3d 70 (1st Cir. 1993), sub nom. United States v. Carrozza. The opinion of the United States District Court for the District of Massachusetts (Wolf, J.), is reported at 807 F.Supp. 165 (D. Mass. 1992).

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on September 16, 1993. Petitioner's timely petition for rehearing was denied on November 22, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional, Statutory, and United States Sentencing Guidelines Provisions Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section §1B1.2 of the United States Sentencing Guidelines provides:

§1B1.2. Applicable Guidelines

a. Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (ie., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). Provided, however, in the case of a plea agreement (written or

made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

b. After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).

c. A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

d. A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Section §1B1.3 of the United States Sentencing Guidelines provides:

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

a. Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the

jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

b. Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish

the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Section §2E1.1 of the United States Sentencing Guidelines provides:

§2E1.1 **Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**

(a) Base Offense Level (Apply the greater):

(1) **19**; or

(2) the offense level applicable to the underlying racketeering activity.

Statement of the Case

On March 22, 1990, a grand jury sitting in the District of Massachusetts returned a 120 page, 65 count superseding indictment charging Raymond J. Patriarca and seven others in Counts One and Two with violations of 18 U.S.C. §1962(c) and (d) (RICO conspiracy and substantive RICO). Patriarca was charged in addition with four Travel Act violations, 18 U.S.C. §1952, and with conspiracy to violate the Travel Act under 18 U.S.C. §371. The substantive Travel Act counts correspond to four of the five predicate acts charged against Patriarca in the RICO counts. These, along with one additional Travel Act allegation, are the only predicate acts of racketeering in which Patriarca is named, out of a total of 68 alleged in the indictment.

Shortly after his indictment, petitioner began to engage the government

in plea negotiations. To facilitate this process, the Probation Department arrived at a preliminary determination, based upon the charges against Patricarca contained in the superseding indictment, that petitioner's offense level was 26, Criminal History Category I, which translated to a guideline sentencing range of 63-78 months. The district judge held numerous conferences with all parties for the express purpose of defining the issues which would be litigated at sentencing if the petitioner were to plead guilty in the absence of a plea agreement with the government. The discussions between the parties and the court were predicated upon a 63-78 month guideline range. The government consistently took the position that, if the district judge accepted petitioner's change of plea, it would seek an upward departure pursuant to U.S.S.G. §5K2.0

and/or §4A1.3,[1] based upon seven categories of uncharged conduct, five of which -- the attempted murder of Vincent Ferrara, the harboring of Alphonse Persico and Salvatore Caruana, marijuana dealings by Caruana, and the murder of Theodore Berns -- were not charged against anyone named in the indictment, and the remaining two of which, the murder of Vincent Limoli and cocaine dealing by Robert Carrozza, were charged only against codefendents and not against the petitioner.

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[1]For example, during the course of lengthy litigation concerning defendant's pretrial release, the district judge relied upon the 63-78 month guideline range, United States v. Patriarca, 776 F.Supp. 593, 599 (D. Mass. 1991), a calculation which the government did not challenge either in the district court or on its appeal of the district court's release order to the First Circuit. See United States v. Patriarca, 948 F.2d 789, 792 (1st Cir. 1991)(absent an upward departure, defendant's "guideline sentence would be in the range of only five to six years").

On December 2, 1991, the day before the petitioner's scheduled change of plea, the government for the first time suggested that petitioner's purported involvement in Caruana's marijuana dealings could be considered relevant conduct within the meaning of U.S.S.G. §1B1.3; as to all uncharged conduct of coconspirators, including both of the murder allegations, the government expressly continued to adhere to its earlier position that such conduct would provide a basis for an upward departure. At no time before the defendant entered his plea of guilty did the government so much as intimate that coconspirator conduct, such as the two homicides, should be treated as relevant conduct for purposes of increasing petitioner's base offense level.

On December 3, 1991, petitioner tendered a plea of guilty to all counts

of the indictment in which he was charged. The district court accepted the guilty plea and continued the matter for sentencing. Not until February 26, 1992, in a sentencing memorandum filed with the district court, did the government change its position and assert that all of the uncharged conduct was relevant conduct under §1B1.3, which would, it contended, mandate an increase of petitioner's offense level from 26 to 40, which would produce a guideline sentencing range of 292-365 months.

The petitioner's Presentence Report calculated petitioner's offense level at 26, Criminal History Category I, which corresponded to the earlier 63-78 month guideline range which informed the pre-plea discussions between the parties and the court, but deferred the relevant conduct question for the district court to determine after further proceedings.

The Probation Department did, however, express its conclusion that, with the exception of the Limoli murder, the uncharged conduct was not relevant conduct within the meaning of §1B1.3.[2]

The district judge found petitioner's offense level to be 27, and departed upwards to a Criminal History Category II based upon the petitioner's marijuana-related activities with Caruana, although he characterized the issue as a close question. This conclusion resulted in a guideline sentencing range of 78-97 months; the district court sentenced petitioner to a term of 97 months on the RICO counts and

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[2]As to the Limoli murder, the Probation Department opined that, because it was charged in the indictment against a co-conspirator, it could be treated as relevant conduct if petitioner's sentencing liability therefor were proven beyond a reasonable doubt, in reliance upon U.S.S.G. §1B1.2(d), Application Note 5.

to terms of 60 months on each of the Travel Act counts, all to be served concurrently.

In so doing, the district court rejected, as a matter of law, the government's argument that six of the seven[3] categories of uncharged conduct could be considered relevant conduct under §1B1.3, concluding, after lengthy and painstaking analysis, that the term "underlying racketeering activity" in the RICO guideline, U.S.S.G. §2E1.1(a)(2) is limited to the predicate acts actually charged against the defendant in the

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[3]As to the seventh, cocaine dealing by codefendant Carrozza, the district court concluded that, while petitioner's involvement in those dealings could, if proved, constitute relevant conduct under its analysis of the interface between §1B1.3 and §2E1.1 because of their relationship to one of the Travel Act predicates charged against petitioner, the government had not proven petitioner's culpability by a preponderance of the evidence. See United States v. Patriarca, 807 F. Supp. at 180.

indictment and that, therefore, uncharged conduct could not be considered "relevant conduct" under §1B1.3 unless that conduct related to the underlying racketeering activity of which the defendant had actually been convicted, a determination to be made by the looking to predicate acts actually charged against the defendant rather than by recourse to any and all conduct, including coconspirator conduct, which might be related to the overarching RICO conspiracy charged against all defendants. United States v. Patriarca, 807 F. Supp. 165, 193 (D. Mass. 1992).

The government appealed the district court's sentencing determination to the First Circuit Court of Appeals. On appeal, the First Circuit reversed the decision of the district court, concluding that the district court erred in limiting relevant conduct to conduct

in furtherance of the predicate acts charged against the defendant in the indictment and holding that relevant conduct in a RICO prosecution includes all conduct in furtherance of the RICO enterprise, including conduct of coconspirators, which is within the scope of the jointly undertaken criminal activity and is reasonably foreseeable to the particular defendant. App. 16, 25.

Reasons Why the Writ Should be Granted

In a RICO prosecution such as this one, in which the indictment alleges a nationwide conspiracy, indeed, in any RICO prosecution alleging a far-flung conspiracy or a multi-tentacled enterprise, the construction of the federal sentencing guidelines adopted by the First Circuit Court of Appeals -- considering an issue never before decided

by any circuit -- produces an extraordinary, and unprecedented, expansion of potential sentencing liability. Under that construction -- which is at odds with a reasoned textual analysis of the guidelines as a whole and with the polices and purposes underlying the guidelines -- the potential relevant conduct sentencing liability, and the concomitant potential for the imposition of vastly increased sentences based upon mandatory increases in the guidelines offense level, assumes truly staggering proportions, permitting as it does the concept of relevant conduct to encompass coconspirator conduct not only not charged against the defendant in the indictment but also not charged against anyone, and which, further, could be completely unrelated to any predicate act of racketeering which is charged against any coconspirator. The proper

interrelationship between U.S.S.G. §1B1.3(a)(1) and §2E1.1(a)(2) is an issue of critical importance to the administration of criminal justice in RICO prosecutions, potentially affecting hundreds of federal criminal defendants each year, and is, therefore, a question which should be resolved by this Court at the earliest possible opportunity.

Moreover, necessarily implicated by the First Circuit's resolution of the guidelines analysis issue are several fundamental, and interrelated, due process issues, such as whether a RICO defendant is entitled, prior to his change of plea, to notice of uncharged conduct, entirely unrelated to the predicate acts with which he is charged, which the government will seek to subsume under the rubric of relevant conduct and based upon which the government will urge the sentencing court to increase the

guidelines offense level and, correspondingly, the applicable guideline sentencing range. The First Circuit chose not to grapple with this and other constitutional issues[4] raised by petitioner below on the ground that, as it was remanding for resentencing in accordance with its construction of the guidelines, such issues were not yet ripe for adjudication and could be mooted by the sentence actually imposed on remand.[5] One significant virtue of the analysis adopted by the district court, and advocated by the petitioner, is that it reconciles most of the complex

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[4]See notes 11, 12, infra.

[5]The Court did note, however, that "[a]t least one member of the panel believes that serious constitutional concerns may arise if the defendant ultimately receives the equivalent of a life sentence on the ground of his connection with a murder for which he was never indicted, tried, or convicted by a jury." App. 48-49 n.9.

constitutional issues raised by petitioner below, many, if not most, of which will inhere in any subsequent RICO prosecution to which the First Circuit's construction might be applied, with a textual and policy analysis of the sentencing guidelines as a whole so as to obviate most of these serious constitutional concerns.

I. THE CONSTRUCTION OF THE GUIDELINES ADOPTED BY THE FIRST CIRCUIT IS INCONSISTENT WITH A PROPER TEXTUAL ANALYSIS OF THE GUIDELINES AS A WHOLE AND WITH THEIR UNDERLYING POLICIES AND PURPOSES

Analysis of the interface between U.S.S.G. §2E1.1(a)(2) and §1B1.3(a)(1) has produced at least three possible interpretations of their proper relationship: (1) the position taken by the Sentencing Commission staff and the United States Probation Department for the District of Massachusetts; (2) the position adopted by the district court,

addressed at length in its thoughtful and comprehensive opinion; and (3) the construction chosen by the First Circuit. Given these three differing interpretations, each arrived at by persons seeking conscientiously to divine the correct application of the guidelines and knowing full well the importance of their determinations to the administration of criminal justice, it is impossible to conclude, as the First Circuit did, that the application of §1B1.3(a)(1) to §2E1.1(a)(2) is "straightforward and unambiguous," App. 41. Because proper application of the guidelines is far from "straightforward and unambiguous," but rather requires a close textual analysis of a number of guidelines provisions in the effort to produce a coherent and consistent whole, it is necessary, contrary to the conclusion of the First Circuit, to

examine the policies and purposes underlying the guidelines, recourse to which makes manifest the erroneous nature of the First Circuit's conclusory, and rather superficial, textual analysis. Of the three interpretations which this case has produced, only the opinion of the First Circuit is inconsistent with, and in fact undermines, these express policies and purposes and raises, rather than eliminates, serious constitutional issues.

A. RICO is a Multi-Object Offense And Is, Therefore, Subject to U.S.S.G. §1B1.2(d)

One critical flaw underlying the First Circuit's opinion is its failure to recognize that RICO is, simply, different from other crimes to which the application of §1B1.3 may in fact be straightforward and unambiguous. Because RICO may encompass an extraordinary variety of conduct under one umbrella

offense[6] -- potentially far exceeding that which might permissibly be subsumed in a count charging the most expansive of single conspiracies -- analysis of what may properly ~~be~~ treated as §1B1.3 relevant conduct in a RICO case assumes uniquely critical significance. Under the First Circuit's formulation, a RICO defendant will be faced with the possibility of a mandatory increase in his guidelines offense level of

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[6]Predicate acts of racketeering may include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs" chargeable under state law and punishable by imprisonment for more than one year and numerous federal offenses including sports bribery, counterfeiting, embezzlement, thefts from interstate shipments, extortionate credit transactions, gambling, mail fraud, wire fraud, obstructions of justice, Hobbs Act violations, money laundering, offenses relating to controlled substances, and currency reporting law violations. See 18 U.S.C. §1961(1).

potentially immense proportions[7] if the district court finds the scope of the broad RICO enterprise, as defined in the indictment, coextensive with the scope of the jointly-undertaken criminal activity to which the defendant is found to have agreed through his membership in the enterprise and then imposes sentencing liability based upon all acts of others it finds to have been committed in furtherance of that broadly-defined enterprise and to have been reasonably foreseeable to the defendant, regardless of how attenuated they are from the predicate acts with which the defendant is charged, or even from the predicate

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[7]The First Circuit chose to defer consideration of whether such vast increases in sentencing liability should be subject to a higher burden of proof than that placed upon the government by the generally applicable preponderance of the evidence standard, App. 55, another substantial due process issue which is somewhat ameliorated by the district court's construction.

acts charged against others. Given the extraordinarily broad terms in which indictments characteristically describe the scope of RICO enterprises,[8] the First Circuit's formulation erects a system which threatens to eradicate the distinction between acts for which a defendant may be held criminally liable and those based upon which sentencing

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[8]For example, in this case, the indictment described the RICO enterprise as "a group of individuals associated in fact which engaged in various criminal activities, consisting of multiple acts involving murder in violation of the laws of the Commonwealth of Massachusetts and the State of California, acts involving kidnapping, robbery and extortion...interference with commerce by threats or violence...obstruction of justice...extortionate extensions of credit and collecting extensions of credit by extortionate means...obstruction of state or local law enforcement...interstate travel in aid of racketeering...interstate transportation of gambling paraphernalia...operating of illegal gambling business...[mail fraud]...distribution of controlled substances...."

liability may be imposed,[9] in direct

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[9]A further fault of the First Circuit's guidelines construction is the potential that it may be misconstrued to incorporate the standards of expanded criminal liability articulated by this Court in Pinkerton v. United States, 328 U.S. 640 (1946), into the RICO sentencing process, which would be a particularly extraordinary expansion of potential sentencing liability given the fact that Pinkerton has never even been applied to questions of criminal liability under RICO. As the Seventh Circuit observed in United States v. Neapolitan, 791 F.2d 489, 504 n.7 (7th Cir. 1980), cert. denied, 479 U.S. 940 (1986):

> Unlike a "standard" conspiracy, a section 1962(d) conspiracy provides for enhanced penalties based, at least in part, on involvement in the predicate crimes defining the conspiracy. Thus a RICO conspiracy is, in and of itself, a cumulative punishment device, allowing for penalties a quantum harsher than those for other conspiracies. Given that implicit within the compound nature of RICO is a concept of punishment for substantive offenses, the commission of which was agreed to by the defendant, it is difficult to see why the government needs to invoke a second cumulative punishment device in the form of Pinkerton. This is not to say that the use of Pinkerton

contravention of the express warning incorporated into the guidelines that "because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly undertaken activity, and hence relevant conduct, is not necessarily the same for every participant." U.S.S.G. §1B1.3, Application Note 1. Accordingly, even though a defendant may be convicted of a broadly-defined RICO offense, the scope of the RICO enterprise or of the RICO conspiracy charged in the indictment does not govern for purposes of sentencing

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instructions in RICO conspiracy cases is "wrong or improper" but only to caution that restraint be applied with regard to Pinkerton in this context. See Department of Justice, RICO: A Manual for Federal Prosecutors, [73-74 (1985)]("the combination of RICO and Pinkerton could lead to unwarranted extensions of criminal liability").

liability: "The scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy." United States v. Lanni, 970 F.2d 1092, 1093 (2d Cir. 1992); Wilkins & Steer, Relevant Conduct: The Cornerstone of the Sentencing Guidelines, 41 SO. CAR. L. REV. 495, 510 (1990). The guidelines incorporate provisions which, if applied as they were intended, perform the individualization of sentencing liability required by the guidelines, an individualization particularly critical in the face of RICO's unprecedented expansion of the traditional limitations upon collective liability. Those provisions are found in the guidelines sections dealing with the treatment of composite offenses which, contrary to the

conclusion of the First Circuit, must be applied to RICO sentencing.

For purposes of applying §1B1.3(a)(1)(B) to §2E1.1(a)(2), the RICO counts -- both conspiracy and substantive -- must be, because of their composite nature, subject to the same guideline treatment as that applicable to conspiracy counts. The Commission expressly incorporated a nexus between the treatment of conspiracies and racketeering offenses under the guidelines: "Some offenses, e.g., racketeering and conspiracy, may be "composite" in that <u>they involve a pattern of conduct or scheme involving multiple underlying offenses</u>." U.S.S.G. Part D, Introductory Commentary (emphasis added). Accordingly, the guidelines categorize both RICO conspiracy and substantive RICO offenses as multi-object

offenses for purposes of determining the guideline offense level.

Where there is more than one "underlying offense," each is to be treated as if contained in a separate count of conviction for the purposes of applying §2E1.1(a)(2). U.S.S.G. §2E1.1, Application Note 1. The Sentencing Commission staff has concluded that the alternate base offense level contained in §2E1.1(a)(2) is determined by treating each predicate act as a separate count of conviction:

> Application Note 1 to §2E1.1 instructs that where there is more than one underlying offense (i.e. predicate act), each underlying offense should be treated as if contained in a separate count of conviction for the purposes of [§2E1.1](a)(2)....Each of the underlying offenses, whether or not charged in substantive counts of conviction, are treated as if they were substantive counts of conviction, or "pseudo counts."

Most Frequently Asked Questions About the Sentencing Guidelines, Vol. VI, Dec. 1, 1992, Question 30 (emphasis added).

Once RICO is recognized as a multi-object offense[10], subject to the same treatment under the guidelines whether

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[10]The cases relied upon by the First Circuit for the proposition that RICO is a single object conspiracy, United States v. Ashman, 979 F.2d 469, 485 (7th Cir. 1992), cert. denied sub nom. Barcal v. United States, 114 S. Ct. 62 (1993); United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir.), cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983), discuss RICO not in terms of whether RICO is a single object conspiracy but rather were concerned with whether the RICO conspiracy charged in the indictment was in fact a single conspiracy or rather multiple conspiracies. The conclusion that RICO permits the charging of a wide-ranging single conspiracy under circumstances which would have constituted multiple conspiracies under pre-RICO law merely redefines the scope of the single conspiracy; it says nothing about whether that single conspiracy may embrace multiple objects. Just as a generic single conspiracy does not become multiple conspiracies because of the charging of multiple conspiratorial objectives in a single count, so too may a single RICO conspiracy encompass multiple objects.

the "underlying offenses" at issue are found in a substantive RICO count or in a RICO conspiracy count, U.S.S.G. §1B1.2(d) becomes applicable. Section §1B1.2(d) echoes §2E1.1, Application Note 1: "a conviction on a count charging conspiracy to commit more than one offense shall be treated as if the defendant has been convicted on a separate count of conspiracy for each offense that the defendant conspires to commit."

Application Note 5 to §1B1.2 provides explicit guidance in resolving guidelines calculations involving composite offenses such as RICO in circumstances such as those presented by this case where a general verdict or a guilty plea fails to particularize the specific objects embraced by the defendant's conspiratorial agreement:

> Particular care must be taken in applying subsection (d) because there are cases in

> which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as trier of fact, would convict the defendant of conspiracy to commit that object offense.

Accordingly, the Chapter Two offense level is to be determined only upon the basis of the object offenses, which must, in the context of the guidelines as a whole, be read as synonymous with the "underlying offense"/"underlying racketeering activity,", i.e. predicate acts, actually charged in the composite offense count; moreover, sentencing liability may be imposed only if the trier of fact concludes beyond a reasonable doubt that the defendant is guilty of that object offense or of conspiracy to commit it.

The guidelines calculations required by U.S.S.G. §2E1.1(a)(2) require, therefore, that each underlying racketeering offense be treated as a separate count of conviction. The express mandate of §1B1.2, Application Notes 1 and 5, limits the eligible racketeering offenses to those "charged" or "alleged" in the RICO counts. Accordingly, in this case, as five of the six remaining offenses asserted by the government to be relevant conduct are not alleged in the RICO counts at all, they may not be considered under §2E1.1(a)(2). The seventh act -- the Limoli murder -- is charged, but not as to the defendant; thus it too cannot be considered under §2E1.1(a)(2), as it cannot be "treat[ed] as if contained in a separate count of conviction."

The district court fully applied §1B1.3 to the offense of conviction as

defined by its analysis -- and the First Circuit's opinion does not discuss why such a definition of the RICO offense of conviction may be erroneous -- concluding that §1B1.3 applies in all its ramifications to the underlying predicate offenses of which the petitioner was convicted. Had, for example, one of the murders for which the government sought to impose relevant conduct sentencing liability been related to one of those predicate acts, the guidelines construction adopted by the district court, and advocated by petitioner herein, would treat it as potential relevant conduct for purposes of applying §1B1.3. See United States v. Masters, 978 F.2d 281 (7th Cir.), cert. denied, 111 S. Ct. 2019 (1991). In that event, whether the murder had been charged in the indictment or not would not have controlling significance. The district

court's analysis did not, therefore, as the First Circuit concluded, App. 26-28, disregard the general premise that relevant conduct may include uncharged conduct, nor do the arguments advanced herein.

Not only did the district court's textual analysis of the guidelines produce an internally consistent formula for applying the sentencing guidelines in RICO cases -- a methodology far more straightforward and simple in its application than is the First Circuit's interpretation, with all its myriad interjected complexities -- but it is also entirely consistent with the express policies and purposes underlying the guidelines. By contrast, the opinion of the First Circuit actively undermines the governing principles which shaped the development of the federal guideline sentencing system and, unlike the

district court's construction, which reconciles the guidelines system with the requisites of due process and fundamental fairness, creates serious constitutional concerns where none need exist.

B. The Guidelines Construction Adapted by the First Circuit is Inconsistent with the Policies and Purposes Underlying the Guidelines

1. Charge Offense v. Real Offense

The guidelines interpretation advanced by petitioner, unlike the approach taken by the First Circuit, is consistent with the essential compromise upon which the guidelines rest -- that between a "charge offense" system and a "real offense" system. See Breyer, The Federal Sentencing Guidelines and the Key Compromises On Which They Rest, 17 HOFSTRA L. REV. 1, 11-12 (1988)(hereinafter "Sentencing Guidelines"). The interpretation adopted

by the First Circuit would entirely eradicate this essential compromise in RICO cases by permitting §1B1.3 to overwhelm the substantial charge offense elements of the guidelines system and to effectively resurrect the expressly rejected "real offense" approach through impermissible expansion of the reach of §1B1.3. Indeed, this preference for charged conduct is apparent in §1B1.3 itself. For example, while §1B1.3(a)(2) was drafted to cover offenses such as drugs or fraud which typically involve "a pattern of misconduct that cannot be broken into discrete identifiable units that are meaningful for purposes of sentencing," U.S.S.G. §1B1.3, Background, the guidelines evidence an expectation that conduct which can be broken into discrete identifiable units will be charged. See, e.g., United States v. Hahn, 960 F.2d 903, 909 (9th Cir. 1992).

This essential compromise was also reached in express recognition of the inadequacy of a "real offense" system to insure the requisite degree of procedural fairness. "It is a compromise forced in part by a conflict inherent in the criminal justice system itself: the conflict between procedural and substantive fairness." Breyer, Sentencing Guidelines, at 9. "A sentencing guideline system must have some real elements, but not so many that is becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise." Id. at 11. No case could better illustrate than this one the monumental procedural unfairness, arising to the level of violations of the Due Process Clause, which would result from the application of "real offense" sentencing to RICO convictions to the exclusion of the essential limiting

principles inherent in a predominantly "charge offense" system.

A particularly acute due process issue in this case arises from the total lack of notice before petitioner's change of plea that the government would seek the imposition of a vastly increased guidelines offense level based upon conduct not charged in the indictment and completely unrelated to the predicate acts with which he was charged.[11] While

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[11]The First Circuit pronounced itself not "as convinced as the district court that sentencing Patriarca on the basis of uncharged relevant conduct might be so unfair as to raise due process concerns," App. 46. In part, the Court based this assessment upon its disagreement with the district court's conclusion that petitioner might face a life sentence if uncharged murders were treated as relevant conduct. However, given the Court's concession that its guideline construction could result in a sentence as high as 65 years, this is a distinction without a difference in the context of a 48 year old defendant suffering from bladder cancer who would be required to serve 85% of any sentence imposed.

the First Circuit did not decide this issue,[12] it well serves to illustrate the

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[12]The Court's reasons for side-stepping this particular issue, which was argued at length to the Court, are less than clear; certainly, the issue of the notice required by the Due Process Clause to be provided to RICO defendants before the entry of a change of plea was squarely presented and ripe for adjudication. However, not only did the First Circuit not decide the notice issue but also it chose to defer consideration of a number of other issues raised below by petitioner pending the district court's sentencing determination on remand -- (1) the burden of proof which is constitutionally required before a vastly enhanced sentence may be predicated upon uncharged conduct, (2) whether the guarantees of the Sixth Amendment Confrontation Clause must be afforded where the issues to be determined at sentencing have the potential to drastically increase the defendant's guideline sentencing range, (3) whether Pinkerton liability may be extended to RICO cases, (4) whether consideration of certain acts upon which the government sought to impose relevant conduct sentencing liability was barred by the Ex Post Facto Clause, (5) whether the Sentencing Commission exceeded its statutory authority in enacting §1B1.3, and (6) whether the government should be estopped by its pre-plea representations from changing its sentencing position after the entry of a guilty plea. Because the First Circuit chose not to pass upon these issues, they are not

constitutional problems inherent in the guidelines construction adopted by the First Circuit.

In the context of guilty pleas, due process must require, at a minimum, that the government, prior to the entry of defendant's plea of guilt, "make known any basis upon which it will urge the base offense level under the guidelines to be increased for reasons not otherwise disclosed in the indictment." United States v. Rivers, 917 F.2d 369, 394 (8th Cir. 1990). The district court's construction of the guidelines substantially ameliorates the notice question by limiting relevant conduct to conduct which is "relevant" to the racketeering acts with which the

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presented in this petition for certiorari but rather will be litigated on remand to the district court in accordance with the procedural preference expressed by the First Circuit.

defendant is charged, thereby incorporating an important element of notice to the defendant as to his potential sentencing liability and defining the limits to which the prosecutor may expand the charges at sentencing.[13]

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[13]Even the most fully informed decision to plead guilty and to litigate the discretionary issues of whether the government has adequately proven its asserted grounds for upward departure and whether those grounds are a permissible basis for an upward departure and, if so, the appropriate extent of any upward departure -- the course chosen by the petitioner in this case -- is a far different matter from the situation confronted by a defendant whose plea of guilt may expose him to the mandatory imposition of a substantially enhanced sentence. The notice problem is particularly acute in this case, in which all the parties -- the court, the government, defense counsel, and the defendant -- were operating at all times prior to the change of plea upon the understanding that absent upward departure the defendant's guideline sentencing range would be 63-78 months.

The First Circuit further denigrated the significance of the notice requirement through its assumption that the Due Process Clause is satisfied by the defendant's knowledge of the

The First Circuit's construction directly conflicts with the Commission's quest for procedural fairness, as the more newly raised offenses with which the district court must grapple at sentencing, and the mere serious their potential impact upon the resulting sentence, the more unwieldy and unfair the process will become. See Breyer, Sentencing Guidelines, at 11.

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statutory maximum sentence to which his guilty plea exposes him. While it certainly was the case before the advent of the guidelines that a defendant exposed himself by a plea of guilty to a potential sentence of up to the aggregate statutory maximum, the reality under the guidelines is quite different -- a defendant potentially exposes himself by a plea of guilty only to the maximum sentence which can be derived by proper application of the guidelines. See U.S.S.G. §6A1.3 Commentary. If as here, a defendant receives no notice, either through the charges levied against him in the indictment or through some other form of pre-plea notice, that the government will rely upon uncharged predicate acts as relevant conduct, such lack of notice raises substantial due process concerns.

2. Administrative Unwieldiness

This case provides a compelling example of the administrative nightmare which would confront district courts everywhere under the First Circuit's guidelines construction. See United States v. Patriarca, 807 F.Supp. at 192-193. The construction adopted by the district court, and urged herein as the correct one, does not "ignore the Commission's compromise between 'real offense' and 'charge offense' sentencing," App. 50. Rather, it expressly recognized that considerations of judicial economy played a significant role in the compromise ultimately reached by the Sentencing Commission. See Breyer, Sentencing Guidelines, at 17.

The First Circuit left it to the Sentencing Commission to fashion a remedy for the administrative unwieldiness which it acknowledged could result from its

guidelines construction, App. 51. There is, however, no need for a "remedy" for the complexities injected by the First Circuit's interpretation of the guidelines, see App. 51; that "remedy" has already been incorporated by the Commission into the guidelines in the form of the guidelines construction urged by petitioner. Indeed, the Court's suggestion that its interpretation of the guidelines may require a "remedy" of such magnitude provides a telling indicium that the Commission did not, in fact, contemplate that §2E1.1 (a)(2) would be construed in the manner chosen by the First Circuit.

CONCLUSION

For all the foregoing reasons, petitioner prays that this Honorable Court grant a writ of certiorari to review the decision of the First Circuit Court of Appeals.

Respectfully submitted,
By his attorneys,

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APPENDIX

TABLE OF CONTENTS

Opinion of the First Circuit Court of Appeals A-1

Order of the First Circuit Court of Appeals denying petition for rehearing . . A-92

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1798

UNITED STATES OF AMERICA,

Appellee,

v.

Robert F. Carrozza,

Defendant, Appellant.

No. 92-1868

UNITED STATES OF AMERICA,

Appellant,

v.

RAYMOND J. PATRIARCA,

Defendant, Appellant.

No. 92-2213

UNITED STATES OF AMERICA,

Appellant,

v.

RAYMOND J. PATRIARCA,

Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Boudin, Circuit Judge,

Campbell, Senior Circuit Judge,

and Stahl, Circuit Judge.

Martin G. Weinberg with whom Oteri, Weinberg & Lawson, John F. Cicilline, Kimberly Homan and Sheketoff & Homan were on briefs for Raymond J. Patriarca.

James L. Sultan with whom Rankin & Sultan was on brief for Robert F. Carrozza.

James D. Herbert, Assistant United States Attorney, with whom A. John Pappalardo, United States Attorney, Jeffrey Auerhahn, Assistant United States Attorney, and Gregg L. Sullivan, Assistant United States Attorney, were on briefs for the United States.

September 16, 1993

CAMPBELL, Senior Circuit Judge.

Raymond J. Patriarca pled guilty to one count of conspiring to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(d), one count of violating RICO, 18 U.S.C. §1962(c), four counts of interstate travel in aid of racketeering, 18 U.S.C. §1952 (the "Travel Act"), and one count of conspiring to violate the Travel Act.

He was sentenced by the United States District Court for the District of Massachusetts to a prison term of 97 months, three years of supervised release, a $50,000 fine, $122,344 costs of incarceration, and $3,954 cost of supervision. Pursuant to 18 U.S.C. §3742(b), the government appeals from the district court's determination that the relevant conduct for sentencing purposes in this RICO case is limited to just the

predicate Travel Act violations charged against Patriarca and conduct relating directly to those charged predicates. Patriarca appeals from the district court's upward departure under U.S.S.G. §4A1.3 and from the district court's imposition of the costs of incarceration and supervision under U.S.S.G. §5E1.2(i).

Robert F. Carrozza appeals from a 228-month sentence imposed by the district court after Carrozza pleaded guilty to 49 counts of racketeering-related offenses. Carrozza argues that the district court's decision to "assume" that his base offense level should be adjusted upwards for his role in the offense constituted plain error.

I. Patriarca's Sentence

A. Background

Count One of the indictment charged Patriarca and seven codefendants with participation in a criminal conspiracy to

violate the RICO statute. Count Two charged the same defendants with a substantive violation of the RICO statute. The remaining 63 counts charged related racketeering acts involving different defendants, including -- in Count 30 -- a conspiracy to violate the Travel Act.

The RICO charges alleged that the Patriarca Family had committed illegal activities over a period of 14 years. They identified the defendants as members of a nationwide criminal organization known as La Cosa Nostra, and described Patriarca's role, after July 1984, as the boss and ultimate supervisor of the Patriarca Family. The RICO counts alleged that the Patriarca Family, named as the RICO enterprise, acted in conformity with the rules of La Cosa Nostra, including the requirement that members commit murder at the direction of

their superiors. It was further alleged that members of the Patriarca Family were required to obey their superiors and commit criminal acts at their direction, including murder. Members of the Patriarca Family were allegedly required to share their illegal profits with their superiors.

The indictment alleged that the Patriarca Family was in the business of extortion, narcotics trafficking, loansharking, gambling, and murder. The indictment charged the commission of a total of 68 separate, predicate acts, most of them by defendants other than Patriarca. The predicate racketeering acts in which Patriarca was personally named were five violations of (and conspiracy to violate) the Travel Act, four of which were also charged as substantive violations against Patriarca in Counts 31, 36, 38 and 39.

Prior to Patriarca's entry of a guilty plea, the government informed the court and Patriarca that it would seek to include specific acts of relevant conduct, pursuant to U.S.S.G. §1B1.3, in determining Patriarca's base offense level, and would further seek upward departures pursuant to U.S.S.G. §4A1.3 and §5K2.0. As an example of relevant conduct, the government then cited Patriarca's involvement in the narcotics trafficking of Patriarca's associate, Salvatore Michael Caruana. As an example of conduct justifying an upward departure, the government cited the murder of Vincent James Limoli, which was charged against one of Patriarca's codefendants.

On December 3, 1991, Patriarca pled guilty without having entered into any agreement with the government. In the sentencing proceedings that ensued, the

government asked the court to consider seven instances of relevant conduct, along with the charged conduct, in determining Patriarca's base offense level for his RICO offense. These instances were (1) Patriarca's involvement in the drug trafficking of Caruana; (2) Patriarca's efforts to harbor Caruana as a fugitive; (3) the murder of Limoli; (4) the murder of Theodore Berns, which was committed by Caruana purportedly because Berns was involved with Caruana's wife; (5) the narcotics activities charged against codefendant Robert Carrozza; (6) Patriarca's alleged authorization of an attempt to murder Vincent Ferrara; and (7) the harboring of La Cosa Nostra member, Alphonse Persico, while he was a fugitive from justice. Of these acts, only the Limoli murder and Carrozza's drug trafficking had been mentioned in

the indictment, these two acts having been charged as predicate acts against Patriarca's codefendants (not Patriarca himself). The government acknowledges that Patriarca had direct personal involvement only in the Caruana drug trafficking and the harboring of Caruana as a fugitive. But it also argues that all seven activities were reasonably foreseeable to Patriarca and were committed during, and in furtherance of, the RICO conspiracy after Patriarca had joined it as its chief.

The government asserted that holding Patriarca responsible for the Limoli or the Berns murder would increase his base offense level to 43, but that this level should then be reduced by three levels because Patriarca's role was minimal or minor under U.S.S.G. §3B1.2. The guideline range for an offense level of 40 and Criminal History Category I is

292-365 months in prison. The government recommended a sentence of 292 months.

After numerous evidentiary hearings, the district court announced its decision to sentence Patriarca to 97 months imprisonment. This was an upward departure from the court's calculated guideline range of 63 to 78 months.[1] The court concluded that relevant conduct in a RICO case was, as a matter of law, limited to the specific predicate acts charged against the defendant (here, as to Patriarca, the Travel Act violations) and conduct relating to the charged predicates. The court observed that the base offense level for RICO is the greater of 19 or "the offense level applicable to the underlying racketeering activity." U.S.S.G. §2E1.1(a). Because

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[1] The district court's extensive sentencing memorandum is published at 807 F. Supp. 165 (D. Mass. 1992).

§2E1.1 specifies more than one base offense level, the court determined that §1B1.3 requires the proper base offense to be ascertained by the inclusion of relevant conduct. The core question, in the court's view, was whether "underlying racketeering activity" within the meaning of §2E1.1(a)(2) referred only to the predicate racketeering acts charged against Patriarca himself, or whether it also embraced other racketeering acts including those of Patriarca's RICO coconspirators committed in the course of the RICO conspiracy.

In opting for the former construction, the court relied upon three principles it felt were key: (1) the guidelines are primarily a "charge offense" system; (2) the guidelines are generally intended to duplicate nationwide past practices; and (3) the guidelines are intended to establish a

sentencing system which is both administratively workable and fair. Regarding the first, the court noted that none of the seven instances of conduct cited by the government had been charged against Patriarca personally in the indictment. As to the second reason, the court noted that there are no reported pre-guideline RICO cases in which a defendant was sentenced and punished for an uncharged murder. With respect to the third, the court stated that the government's position was administratively unwieldy: weeks or months of evidentiary hearings could be required to decide if a defendant committed the uncharged relevant conduct. Finally, the court was concerned about the procedural fairness of punishing a defendant for an uncharged murder without indictment, trial by jury, and proof beyond a reasonable doubt.

The court reasoned that adoption of the government's position would raise serious constitutional questions which the district court's interpretation would avoid. Treating the Limoli or Berns murder a relevant conduct would, the court believed, have the effect of raising the maximum penalty for the RICO violations from 20 years to life imprisonment. The RICO penalty provision, 18 U.S.C. §1963(a), provides for a maximum sentence of 20 years unless "the RICO violation is based on racketeering activity for which the maximum penalty includes life imprisonment," in which case the maximum sentence is life. The guideline penalty for murder, which is a level 43 offense, is life imprisonment. Because the district court, unlike the government, thought a three-level reduction for a minor or minimal role in the offense was

unlikely, the court reasoned that if Patriarca was held responsible for the Limoli or Berns murders, his probable sentence would be life imprisonment. In the court's view, therefore, treating the murders as relevant conduct (thereby increasing the guideline range from 63-78 months to life) would violate the due process clause of the constitution by permitting the relevant conduct determination "to be a tail which wags the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

The government appeals from this determination.

B. The Government Appeal: Relevant Conduct

"The legal determination as to the proper interplay among related guidelines is subject to plenary review." United States v. Schultz, 970 F.2d 960, 962 (1st

Cir. 1992), cert. denied, 113 S. Ct. 1020 (1993). Therefore, we review de novo the district court's application of the relevant conduct guideline, U.S.S.G. §1B1.3, to the RICO guideline, U.S.S.G. §2E1.1. We conclude that the district court erred when it limited relevant conduct to conduct in furtherance of the predicate acts charged against Patriarca. We hold that relevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs.

We agree with the government that the language of the relevant conduct section, §1B1.3[2], and its application to

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[2] The relevant conduct guideline, in pertinent part, provides the following:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or

willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense....

U.S.S.G. §1B1.3(a)(1).

The relevant conduct guideline quoted here is the amended version of §1B1.3, which became effective on November 1, 1992, after Patriarca was sentenced. Because the 1992 amendments to §1B1.3 only clarify the previous version of the guideline, we may refer to the later version. See 1B1.11(b)(2) ("the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than

the RICO guideline, §2E1.1, are clear, and hence must be applied. Section 1B1.3 calls for determining the following guideline elements on the basis of relevant conduct as defined: (1) the base offense level, where the guideline specifies more than one base offense level, (2) specific offense characteristics, (3) cross references in Chapter Two, and (4) adjustments in Chapter 3. The RICO guideline, §2E1.1[3],

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substantive changes").

[3] The RICO guideline provides the following:

§2E1.1 **Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**

(a) Base Offense Level (Apply the greater):

(1) **19**; or

(2) the offense level applicable to the

specifies more than one base offense level, including a cross reference to "the offense level applicable to the underlying racketeering activity." See United States v. Masters, 978 F.2d 281, 284 (7th Cir. 1992) (reference to "underlying racketeering activity" in §2E1.1(a)(2) is a cross reference), cert. denied, 113 S.Ct. 2333 (1993); U.S.S.G. §1B1.5, application note 1 (cross references may be general, such as "to the guideline for the 'underlying offense'"). Therefore, §1B1.3 requires the base offense level for §2E1.1 to be determined on the basis of relevant conduct as that term is described in §1B1.3(a)(1).

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underlying racketeering activity.

U.S.S.G. §2E1.1

Section 1B1.3 states that "in the case of a jointly undertaken criminal activity," relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. §1B1.3(a)(1)(B). This is often referred to as the accomplice attribution element of relevant conduct. "Jointly undertaken criminal activity" is defined in §1B1.3(a)(1)(B) as "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." Id. (emphasis added). Here, the RICO enterprise -- the Patriarca Family -- was a "jointly undertaken criminal activity." Thus, Patriarca is potentially liable for the foreseeable criminal acts of others in furtherance of that enterprise even

though he did not personally participate in them.

The application notes expand on the role of relevant conduct in the case of criminal activity undertaken in concert with others. We quote from application note 2 to §1B1.3 at length because of the guidance it provides to courts in determining when a defendant is responsible for the conduct of others under the accomplice attribution element of the relevant conduct guideline:

> In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:
>
> (i) in furtherance of the jointly undertaken criminal activity; and
> (ii) reasonably foreseeable in connection with that criminal activity.
>
> Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the

defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

> Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

U.S.S.G. §1B1.3, application note 2.

Application note 2 reflects recognition that the accomplice attribution provision of §1B1.3 operates to hold a defendant responsible for the conduct of others even though "a count may be worded broadly and include the conduct of many participants over a period of time." So as to keep the

criminal responsibility within bounds, §1B1.3 requires sentencing courts to ascertain on an individual basis the scope of the criminal activity that the particular defendant agreed jointly to undertake. U.S.S.G. §1B1.3, application note 2. To do this, the court may consider any "explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." Id.; see United States v. Innamorati, No. 91-1896, slip op. at 66 (1st Cir. June 17, 1993) (members of drug distribution conspiracy may be held accountable at sentencing for different quantities of narcotics, "depending on the circumstances of each defendant involvement"); United States v. Collado, 975 F.2d 985, 992 (3d Cir. 1992) ("the crucial factor in accomplice attribution is the extent of the defendant's involvement in the conspiracy"); Wilkens

& Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 511 (1990) ("liability might be justified for those who are at the top directing and controlling the entire operation") (quoting 2 W. LaFave & A. Scott, Substantive Criminal Law §6.8 at 155 (1986)).

On remand here, therefore, the district court must determine (1) the scope of the joint criminal activity explicitly or implicitly agreed to by Patriarca jointly with others; (2) whether the criminal acts proffered as relevant conduct were in furtherance of this jointly undertaken criminal activity; and (3) whether the proffered acts were reasonably foreseeable in connection with that criminal activity. These determinations will fix the relevant conduct under §1B1.3 for

purposes of calculating the offense level under §2E1.1. Such determinations are, of course, all inherently fact-bound. See, e.g., Innamorati, slip op. at 66.

Rather than applying §1B1.3 to §2E1.1 in the straightforward manner discussed above, the district court limited relevant conduct to only those predicate acts that were charged against Patriarca personally -- namely, the Travel Act violations. In doing so, the district court improperly treated the term "underlying racketeering activity" in §2E1.1(a)(2) as if it "otherwise specified" that relevant conduct should not apply to each "offense of conviction" (including the RICO conspiracy count and the substantive RICO count) and instead should apply only to the predicate Travel Act violations. See U.S.S.G. §1B1.3(a) ("Unless otherwise specified, ... cross references ... shall be determined on the

basis of ... all reasonably foreseeable acts ... that occurred during the commission of the offense of conviction ...") (emphasis added). This was error. "Subsection (a) [of §1B1.3] establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level ..." U.S.S.G. §1B1.3, Background. The background commentary to §1B1.3 further makes clear that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline range." Section 2E1.1 -- specifically the term "underlying racketeering activity" -- contains no explicit instructions displacing the general rule in §1B1.3 that relevant conduct includes uncharged conduct. In a

RICO case, there is no justification for limiting "underlying racketeering activity" just to predicate acts specifically charged against one defendant.[4]

We, therefore, agree with the government that the term "underlying racketeering activity" in §2E1.1(a)(2) means simply any act, whether or not

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[4] Aside from its departure from the relevant conduct guideline, the district court's interpretation could raise other problems. For example, in some circuits the government need not allege specific predicate acts when it charges a defendant with RICO conspiracy. See United States v. Glecier, 923 F.2d 496, 501 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991); United States v. Phillips, 874 F.2d 123, 127-28 (3d Cir. 1989). A court sentencing a defendant in such a case would be put in a difficult position if forced to apply literally the district court's analysis. Because such cases do not identify and charge the "underlying racketeering activity," a court following the district court's approach might be limited to the base offense level of 19 as specified in §2E1.1(a)(1), even though the real offense conduct underlying the conspiracy is considerably more serious than other level 19 offenses.

charged against defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. §1961(1)[5] and is otherwise relevant conduct under §1B1.3. Because the reference to "underlying racketeering activity" is a cross reference, §1B1.3 comes into play and defines "the range of conduct that is relevant ...." See U.S.S.G. §1B1.3, Background. It follows that the acts of relevant conduct proffered by the government, all of which are racketeering acts that could have been charged as predicate offenses, come under the

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[5] Section 1961(1) defines "racketeering activity" to include, inter alia, "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; ... [and] any act which is indictable under ... title 18 ... section 1512 (relating to tampering with a witness, victim, or an informant)...."

heading of "relevant conduct" for sentencing Patriarca on the RICO counts of conviction, provided they otherwise meet the accomplice attribution standards of §1B1.3(a)(1)(B).

To avoid this conclusion, Patriarca cites to application notes 1 and 5 to U.S.S.G. §1B1.2. He argues that these application notes show that the term "underlying racketeering activity" should be limited to the specific predicate acts charged against him. We think that neither application note is applicable here.

Application note 1 to U.S.S.G. §1B1.2 states the following;

> This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular

> statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted. (Emphasis ours.)

Patriarca relies on the emphasized portion for the proposition that relevant conduct pertaining to composite crimes, like RICO, must be limited to conduct charged in the indictment. It is clear, however, from the full text of the application note, that the note is meant to guide courts in the initial selection of the applicable guideline in Chapter Two, not to limit cross references within a particular guideline. There is no question here that the applicable guideline for RICO convictions is §2E1.1.

Thus, application note 1 to §1B1.2 provides no support for Patriarca's argument.

Application note 5 to §1B1.2 is equally immaterial to the application of relevant conduct to §2E1.1. Application note 5 relates specifically to §1B1.2(d), which states that: "A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application note 5 in turn provides the following:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense <u>alleged in the conspiracy count</u> if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note,

> however, that if the object offenses specified in the conspiracy count would be grouped together under §3D.1.2 (d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

U.S.S.G. §1B1.2, application note 5 (emphasis added).

In arguing that §1B1.2(d) and application note 5 limit relevant conduct in composite cases, like RICO cases, to conduct "alleged" in the indictment as predicate acts, Patriarca notes similar language in the application notes to §2E1.1 and the multiple count rules. Application note 1 to §2E1.1 states that "[w]here there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction...." Similarly, the introductory commentary to the multiple count rules provides that "[s]ome offenses, e.g., racketeering and

conspiracy, may be 'composite' in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses. " Application note 8 to §3D1.2 refers specifically back to §1B1.2(d): "A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary." U.S.S.G. §3D1.2, application note 8 (emphasis added).

On the basis of this commentary, Patriarca contends that the only way to apply the multiple count section of the

guidelines to a RICO conviction is to use the directions for the more commonly applied conspiracy, and hence the rule of §1B1.2(d).[6] We disagree. First, the

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[6] The training staff at the Sentencing Commission apparently agrees. In the latest issue of the Sentencing Commission's Most Frequently Asked Questions About the Sentencing Guidelines, Vol. VI, Dec. 1, 1992, Question 30 asks: "The defendant was convicted of RICO (18 U.S.C. §1962). How is the alternative base offense level at §2E1.1(a)(2) determined?" The answer provides the following:

> Application note 1 to §2E1.1 instructs that where there is more than one underlying offense (i.e. predicate act), each underlying offense should be treated as if contained in a separate count of conviction for the purposes of subsection (a)(2). (See §1B1.2(d) and Application Note 5.) Each of the underlying offenses, whether or not charged in substantive counts of conviction, are treated as if they were substantive counts of conviction, or "pseudo counts."

Id. The training staff's informational booklet states that "[t]he information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case."

definition of "offense" contained in the application notes to U.S.S.G. §1B1.1 is not limited to charged offenses. Instead, "offense" is defined to mean "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. §1B1.1, application note 1(1) (emphasis added). As stated previously, §2E1.1 does not specify a different meaning; therefore, there is no reason to interpret "underlying offense" to exclude uncharged conduct.

Furthermore, although applying §1B1.2(d) to RICO convictions has some superficial appeal, there would be insurmountable obstacles to its practical

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Because §1B1.2(d), by its own terms, is not applicable to RICO convictions, we do not follow the training staff's suggestion.

application. First, by its own terms, §1B1.2(d) is limited to counts "charging a conspiracy." Therefore, it is difficult to see how §1B1.2(d) could apply to a substantive RICO violation (as opposed to a RICO conspiracy). Even overlooking this language, it would be impossible under application note 5 for a court to determine whether it "would convict the defendant of conspiring to commit" an underlying offense in situations where the defendant is charged with a substantive RICO violation and the underlying offense is not a conspiracy. Thus, §1B1.2(d) is inapplicable to nonconspiracy offenses such as a substantive RICO violation.

There are problems with applying §1B1.2(d) to RICO conspiracies as well. It seems clear from the plain text of §1B1.2(d), the application notes, and the

official commentary[7] that §1B1.2(d) was

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[7] Official comments made by the Sentencing Commission at the time that it enacted §1B1.2(d) clarify the purpose of Application note 5:

> [Application note 5] is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. Compare United States v. Johnson, 713 F.2d 633, 645-46 (11th Cir. 1983) (conviction stands if there is sufficient proof with respect to any one of the objectives, with United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977) (failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid). In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were "sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d) (e.g.,

enacted to deal with multiple object conspiracies charged in a single count. A RICO conspiracy, however, is considered a single object conspiracy with that object being the violation of RICO. United States v. Ashman, 979 F.2d 469, 485 (7th Cir. 1992) ("The goal of a RICO conspiracy is a violation of RICO.") (quoting United States v. Neapolitan, 791 F.2d 489, 496 (7th Cir.), cert. denied, 479 U.S. 940 (1986)), petition for cert. filed sub nom. Barcal v. United States, 61 U.S.L.W. 3857 (U.S. April 6, 1993)(No. 92-1804). In enacting RICO, Congress intended that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be

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fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct.

U.S.S.G. App. C., para. 75, p. 29 (Nov. 1, 1989).

tried as a single enterprise conspiracy' if the defendants have agreed to commit a substantive RICO offense."[8] United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir.) (quoting United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982) (internal citation omitted)), cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983).

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[8] Rather than merely requiring a defendant to agree to commit a substantive RICO offense, this circuit follows the minority rule, which requires that a defendant agreed to commit, or in fact committed, two or more specified predicate crimes as part of the defendant's participation in the affairs of the enterprise in order to convict the defendant for a RICO conspiracy. United States v. Boylan, 898 F.2d 230, 241 (1st Cir.), cert. denied, 498 U.S. 849 (1990); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983). This minority rule, however, does not affect the general premise that a RICO conspiracy is a single object conspiracy.

Application notes 1 and 5 to §1B1.2 are not, therefore, material to determining whether relevant conduct must be limited to predicate acts charged against a defendant. Instead §1B1.3 determines the range of conduct that is relevant to cross references such as the term "underlying racketeering activity" in §2E1.1(a)(2), and the background commentary to §1B1.3 makes clear that "[c]onduct that is not formally charged ... may enter into the determination of the applicable guideline sentencing range."

Because the application of §1B1.3 to §2E1.1 is straightforward and unambiguous, the district court erred in resorting to the general principles underlying the guidelines and the general rule of construction that "courts should construe statues to avoid decision as to their constitutionality." See, e.g.,

United States v. Monsanto, 491 U.S. 600, 611 (1989). "[C]ourts should strive to apply the guidelines as written, giving full force and effect to the Sentencing Commission's interpretive commentary and application notes." United States v. Zapata, No. 93-1116, slip op. at 4 (1st Cir. July 19,1993); accord Stinson v. United States, 113 S. Ct. 1913, 1915 (1993); United States v. Brewster, No. 93-1046, slip op. at 7 (1st Cir. July 28, 1993). Absent specific provision in §2E1.1 that "underlying racketeering activity" includes only charged predicate acts, we see no principled basis to read such a limitation into the provision.

Even were the application of relevant conduct to §2E1.1 less clear than it is, we would have trouble accepting the three principles cited by the district court as the rationale for limiting relevant conduct to the

predicate acts actually charged against a defendant. The district court felt that "the Sentencing Guidelines are closer to a 'charge offense' system than a 'real offense' system of punishment." Patriarca, 807 F. Supp. at 190; U.S.S.G. Ch. 1, Pt. A, 4(a), p. 5. In the court's view, the reason the government did not charge the conduct at issue in this appeal as predicate acts in the indictment is because the government had insufficient evidence to sustain a conviction for this conduct. 807 F. Supp. at 191. Because conduct "which the prosecutor can prove in court" is supposed to "impose[] a natural limit upon the prosecutor's ability to increase a defendant's sentence, " U.S.S.G. Ch. 1, Pt. A, 4(a), p. 5, the court thought that it would be improper for a sentencing court to increase a defendant's sentence on the basis of uncharged predicate acts.

Similar arguments have been rejected by this court and virtually every other circuit court to have addressed the issue. See, e.g., United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Galloway, 976 F.2d 414, 424 n.6 (8th Cir. 1992) (collecting cases), cert denied, 113 S. Ct. 1420 (1993). While the district court is correct that "for the most part, the court will determine the applicable guideline by looking to the charge of which the offender was convicted," United States v. Blanco, 888 F.2d 907, 910 (1st Cir. 1989), real offense principles enter into the punishment prescribed in the guidelines through the relevant conduct guideline, §1B1.3. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 11-12 (1988). Relevant conduct increases a defendant's

sentence, sometimes very significantly, despite the fact that it was not charged in an indictment, e.g., Blanco, 888 F.2d at 910, and even despite the fact that a jury may have acquitted the defendant for that precise conduct. E.g., Mocciola, 891 F.2d at 16-17; United States v. Rumney, 867 F.2d 714, 719 (1st Cir.)("traditional sentencing factors need not be pleaded and proved at trial")(quoting United States v. Brewer, 853 F.2d 1319, 1326 (6th Cir.), cert. denied, 488 U.S. 946 (1988)), cert. denied, 491 U.S. 908 (1989). This is because sentencing factors, including the applicability of relevant conduct, need only be proven by a preponderance of the evidence, not beyond a reasonable doubt. Mocciola, 891 F.2d at 16-17; Galloway, 976 F.2d at 424 n.6. As noted below, in pre-guideline cases courts likewise took into account untried criminal conduct

when exercising sentencing discretion. The fact that the government has not charged and proven beyond a reasonable doubt the conduct now asserted as relevant conduct does not prevent the increase in sentence resulting from the relevant conduct guideline. We see no special reason to deviate from this principle when dealing with a RICO conviction.

Nor are we as convinced as the district court that sentencing Patriarca on the basis of uncharged relevant conduct might be so unfair as to raise due process concerns. The district court assumed that if Patriarca was held responsible for either the Limoli or Berns murder, Patriarca would face a potential life sentence under the guidelines and the RICO penalty provision. We believe that the district court was mistaken in this assumption.

The RICO statute sets the maximum prison sentence at 20 years unless "the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. 1963(a) (emphasis added). We agree with the government that the statutory maximum sentence must be determined by the conduct alleged within the four corners of the indictment. Otherwise, a defendant would not know at the time of his arraignment or change of plea what his maximum possible sentence would be on the charged offenses. The charged conduct, if proven beyond a reasonable doubt, constitutes the "violation" of which a defendant is convicted. Patriarca's charged conduct included no acts such as would result in a life sentence. The predicate acts charged in the indictment were all violations of the Travel Act, which does not carry a

possible life sentence. Therefore, while for sentencing purposes within the 20-year maximum Patriarca is liable for uncharged as well as charged relevant conduct, his maximum penalty is fixed at twenty years for each of the RICO counts.[9] The relevant conduct

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[9] At oral argument, Patriarca contended that if the district court determines that Patriarca's base offense level on the RICO counts is 43 (i.e., if the court decides that Patriarca is responsible for a murder and that a minimal role adjustment would be improper), then the court in applying U.S.S.G. §5G1.2(d) should impose consecutive sentences, which could total up to 65 years (20 years for each of the two RICO counts and 5 years for each of the five Travel Act counts). See United States v. Masters, 978 F.2d 281, 284 (7th Cir. 1992) (affirming district court sentencing RICO defendant to consecutive maximum sentences of 20 years on each count, for a total of 40 years, in order to come as close as possible to life imprisonment prescribed for level 43 offenses), cert. denied, 113 S. Ct. 2333 (1993). At least one member of the panel believes that serious constitutional concerns may arise if the defendant ultimately receives the equivalent of a life sentence on the ground of his connection with a murder for which he was never indicted, tried or convicted by a

determination here affects only where, within that statutory range, Patriarca should be sentenced.

We are also unpersuaded by the district court's concern that sentencing Patriarca on the basis of uncharged predicate acts would be "inconsistent with the Sentencing Commission's intention to set up a system which is not administratively unwieldy." Patriarca, 807 F. Supp. at 192.

While it is true that considerations of administrative efficiency as well as procedural fairness prompted the Commission to require sentencing courts "to determine the applicable guideline by

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jury. However, the district court may yet ultimately sentence Patriarca to considerably less than 65 years. Because the district court has not yet sentenced Patriarca under the relevant conduct guideline as we interpret it today, any decision as to the constitutional implications, if any, of a 65-year sentence would be premature.

looking to the charge of which the offender was convicted," it is also clear that the Commission intended real offense principles to apply to determine the applicability of various adjustments, including cross references. See Blanco, 888 F.2d at 910. The fact that application of real offense principles may burden a sentencing court with additional fact finding is no reason to ignore the Commission's compromise between "real offense" and "charge offense" sentencing. See id. at 911. Sentencing a RICO defendant on the basis of uncharged predicate acts may not, indeed, prove to be impracticable. Drug conspirators are frequently sentenced on the basis of drug transactions committed by coconspirators. In both situations, the court must determine the scope of the criminal activity agreed to by the defendant, the reasonable foreseeability

of the conduct proffered as relevant conduct, and whether the relevant conduct was in furtherance of the jointly undertaken activity. To be sure, the wide range of crimes covered by RI O may inject new complexities, but, if so, the remedy lies with the Sentencing Commission. The courts are not empowered to rewrite the relevant conduct guideline.[10]

Finally, the district court's observation that there are apparently no reported pre-guideline cases in which a RICO defendant was sentenced on the basis of an uncharged murder is not

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[10] We recognize that determining uncharged relevant conduct could sometimes impose tremendous additional burdens on a court. Relief may be afforded, however, in some instances by the fact that district courts need not make findings as to acts proffered as relevant conduct if the findings will not reflect the offense level. See U.S.S.G. §3D1.4 (instructions on determining the combined offense level).

dispositive. There could, of course, have been such cases that went unreported or unappealed. Sentences were not usually the subject of published opinions prior to the guidelines. And courts often used material information from many sources in exercising their discretion to set a sentence within the permissible, often very wide, statutory range. See, e.g., Roberts v. United States, 445 U.S. 552, 556 (1980); Williams v. New York, 337 U.S. 241, 250-51 (1949); United States v. Lee, 818 F.2d 1052, 1055 (2d Cir.)("Any circumstance that aids the sentencing court in deriving a more complete and true picture regarding the convicted person's background, history, or behavior is properly considered. For that reason, ..., other crimes for which the defendant was neither tried nor convicted, and crimes charged that resulted in acquittal may be used by the

sentencing court in determining sentence")(citation omitted), cert. denied, 484 U.S. 956 (1987).

We conclude that the principles put forward by the district court provide no adequate reason for limiting relevant conduct to charged predicate acts in RICO cases. Because the district court incorrectly interpreted the guidelines, it did not reach a host of other arguments raised by Patriarca in an attempt to avoid the straightforward application of the relevant conduct guideline, §1B1.3, to §2E1.1. These arguments include: whether due process and the Confrontation Clause require additional procedures, such as a higher standard of proof than preponderance of the evidence, in order to hold Patriarca responsible for the proffered relevant conduct; whether due process requires notice of proffered relevant conduct not

otherwise disclosed in the indictment prior to the entry of a defendant's plea of guilty; whether sentencing Patriarca for murders that occurred prior to the effective date of the guidelines violates the Ex Post Facto Clause, even though the RICO offense extended beyond that date; whether the relevant conduct guideline exceeds the Sentencing Commission's statutory authority; and whether the government should be estopped from arguing that Patriarca is responsible for the proffered relevant conduct. Several of these arguments have been expressly rejected by this circuit and others. See, e.g., United States v. Brewster, No. 93-1046, slip op. at 5 (1st Cir. July 28, 1993) ("Absent bad faith... the critical time for disclosure of sentence-related information is not prior to the taking of a plea, but prior to sentencing."); United States v. David, 940 F.2d 722, 739

(1st Cir. 1991) ("It is well established that the guidelines apply to a defendant whose offense begins before the guidelines' effective date and continues after the effective date."), cert. denied, 112 S. Ct. 2301 (1992); Galloway, 976 F.2d at 421-22 (rejecting argument that relevant conduct provision is not authorized by the Sentencing Reform Act). However, it is not necessary for us to decide these issues in the first instance. On remand, the district court should consider, and where appropriate, decide those issues that Patriarca chooses to assert again.

In a last ditch effort to avoid resentencing, Patriarca contends that the legal issue of how relevant conduct is applied to the RICO guideline has been effectively mooted by the district court's findings concerning the proffered acts of relevant conduct. Patriarca

asserts that in the course of determining whether an upward departure was warranted pursuant to §5K2.0 and §4A1.3, the court found, as a matter of fact, that the government had no established his criminal liability for five of the seven relevant conduct allegations -- the Limoli and Berns homicides, the Carrozza drug dealing, the Ferrara "hit," or the harboring of Alphonse Persico.[11]

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[11] As to the remaining two proffered acts of relevant conduct -- Caruana's marijuana importation and fugitive status -- , Patriarca contends that the court's finding that such conduct warranted a criminal history upward departure and the fact that the indictment mentions drug trafficking in general, rather than particularly alleging marijuana importation, preclude consideration of this conduct as relevant conduct. Neither contention has merit. The court treated the Caruana allegations under the upward departure guideline, §4A1.3, only because the court thought this uncharged conduct could not qualify as relevant conduct under §1B1.3. Moreover, we think the indictment's generic allegation of narcotics trafficking is sufficient to permit the court to consider marijuana importation as relevant conduct.

This contention has not merit. The district court expressly stated that because it found that relevant conduct must be limited to charged predicate acts, it was not deciding "whether the crimes at issue with regard to relevant conduct were within the scope of the defendant's conspiracy and/or reasonably foreseeable consequences of it." Patriarca, 807 F. Supp. at 196. In discussing the purported conduct in its upward departure analysis, the district court merely stated that it was not persuaded that Patriarca knew of, or personally participated in, these offenses. However, a defendant can be accountable for the acts of his coconspirators under §1B1.3 without having been personally involved. The standard is whether the acts of

co-conspirators were in furtherance of the jointly undertaken activity and were reasonably foreseeable to the defendant. The seven acts proffered as relevant conduct must be reexamined in light of this standard.

C. Patriarca's Appeal

Patriarca appeals from the district court's upward departure under U.S.S.G. §4A1.3 and from the district court's imposition of the costs of incarceration and supervision under U.S.S.G. §5E1.2(i). Our holding that the district court must resentence Patriarca on the basis of his relevant conduct moots the issue of the propriety of the court's upward departure. The district court departed upwards under §4A1.3 on the basis of its finding that the government had proved by a preponderance of the evidence that Patriarca had "aided and abetted drug crimes committed by Salvatore Michael

Caruana" from 1981 to 1983. Patriarca, 807 F. Supp. at 170. Because on remand the court will decide if the Caruana conspiracy is relevant conduct for RICO sentencing purposes, its utilization as a basis for upward departure need not be considered here, and is vacated.

For similar reasons, we must reject Patriarca's challenge to his cost-of-imprisonment fine. As part of his sentence, the district court ordered Patriarca to pay a fine of $50,000 pursuant to U.S.S.G. §5E1.2(c), plus $122,344 for the cost of his imprisonment, and $3,954 for the cost of his supervision. Patriarca, 807 F. Supp. at 210. The later portion of the fine was assessed pursuant to U.S.S.G. §5E1.2(i), which states the following:

> Notwithstanding the provisions of subsection (c) [the minimum-maximum fine table] of this section, but subject to the provisions of subsection (f) [the defendant's

> ability to pay] herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

U.S.S.G. §5E1.2(i). Patriarca contends that the Sentencing Reform Act, 18 U.S.C. §3553(a), does not authorize imposition of a fine to recompense the government for the cost of incarceration or supervised release, and §5E1.2(i) is therefore invalid.

The few circuit courts to have addressed this question agree that the Sentencing Reform Act does not authorize the assessment of a fine solely to pay for the costs of a defendant's imprisonment. United States v. Spiropoulos, 976 F.2d 155, 165-69 (3d Cir. 1992); United States v. Hagmann, 950 F.2d 175, 187 n.29 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992). They disagree, however, as to whether

§5E1.2(i) can be justified on other grounds. Compare United States v. Turner, No. 93-1148, 1993 U.S. App. LEXIS 17472 (7th Cir. July 14, 1993)(costs of confinement reflect seriousness of the crime and increase deterrence) and Hagmann, 950 F.2d at 187 ("the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment - an indicator of the actual harm each has inflicted upon society - is a rational means to assist the victims of the crime collectively") with Spiropoulos, 976 F.2d at 168 ("The cost of imprisoning a defendant has little, if anything, to do with the amount that the defendant has harmed his or her victim(s), and is therefore questionable as an appropriate method of restitution."); see United States v. Doyan, 909 F.2d 412, 416 (10th Cir. 1990)("Whether the purpose of the

contested fine is to punish, deter, or to spare the taxpayers a substantial expense that has been generated by an intentional criminal act, we cannot say that Guideline §5E1.2(i) as applied here bears no rational relation to the legitimate governmental interest in criminal justice."). The government here argues that §5E1.2(i) is merely a means of achieving the clearly authorized purpose of punishing a defendant based on the seriousness of his or her offense.

We do not find it appropriate to answer this question at the present time. First, Patriarca did not object to his cost-of-imprisonment fine at the time of sentencing. Hence, the district court had no reason to focus on the issue, and we lack the benefit of its considered views. Absent plain error, we normally will not consider an issue raised for the first time on appeal. See United States

v. Newman, 982 F.2d 665, 672 (1st Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3751 (U.S. April 22, 1993) (No. 92-1703); United States v. Haggert, 980 F.2d 8,11 (1st Cir. 1992); United States v. Mondello, 927 F.2d 1463, 1468 (9th Cir. 1991) (refusing to consider argument not raised below that the fine provisions of the Guidelines are contrary to statutory authorization). Because the fine issue is one which has divided our sister circuits, we cannot see that the district court's alleged error in assessing the §5E1.2(i) fine was a "plain" one within the meaning of Fed. R. Crim. P. 52(b). See United States v. Oltano, 113 S. Ct. 1770, 1777 (1993).

In addition, our decision that Patriarca must be resentenced taking into account uncharged relevant conduct requires that we also vacate the fine portion of Patriarca's sentence. Should

the district court on remand determine that Patriarca must be sentenced at a higher base offense level, his minimum and maximum fine range under §5E1.2(c) will likewise increase. Moreover, Patriarca's cost of imprisonment necessarily depends upon the length of his confinement. On remand, Patriarca can argue that a cost-of-imprisonment fine under §5E1.2(i) is inconsistent with the Sentencing Reform Act. Should the district court reject the argument and Patriarca again appeal from the fine, that will be the appropriate time for this court to decide the question. Presently, however, because we must vacate the fine and because Patriarca did not raise the issue below - hence failing to bring the claimed error to the district court's attention for focused consideration - we find it inappropriate to decide whether §5E1.2(i) is valid.

II. Carrozza's Sentence

Defendant/appellant Robert F. Corrozza appeals from a judgment of conviction and a 228-month sentence imposed by the district court, after Carrozza pleaded guilty to 49 counts of racketeering-related offenses, including violations of the RICO statute, extortion, kidnapping, loansharking, narcotics distribution, gambling, obstruction of justice, and intimidation of a witness. Carrozza argues that the district court's decision to "assume" that Carrozza's base offense level should be adjusted upwards for his role in the offense constituted plain error.

After extensive plea negotiations, Carrozza and four of his codefendants entered into plea agreements with the government. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), Carrozza and the government agreed that a specific sentence of 228

months was "the appropriate disposition of the case," constituting "a justifiable departure within the meaning of §6B1.2(c)(2) of the United States Sentencing Guidelines." Both parties agree on appeal that this "justifiable departure" was understood to have been a downward departure.

Apart from the agreed sentence, Carrozza received two additional benefits in exchange for his plea of guilty. First, the government promised not to prosecute Carrozza for his alleged involvement in the murder of William Grasso and the attempted murder of Francis Salemme, Sr. Second, the government promised that Carrozza would not be subpoenaed to testify in any federal grand jury investigation in the District of Massachusetts relating to the activities of the Patriarca Family

occurring before the date of the plea agreement.

The plea agreements for all five defendants were made expressly contingent upon the district court's acceptance of the pleas of guilty from each defendant. According to the government, the interdependency of the plea agreements reflected the government's major purpose in entering the agreements - eliminating the need for any trial, which the parties estimated would take from six months to a year or more. Because removing some but not all of the defendants would not significantly reduce the time necessary to try the case, the government bargained for, and obtained, the option to withdraw all five plea agreements if any of the defendants moved successfully to withdraw his plea.

The district court conditionally accepted the guilty pleas pending

consideration of the presentence reports ("PSR"). The preliminary PSR for Carrozza was completed on April 3, 1992. The preliminary PSR calculated his applicable guideline range, based on an offense level of 33 and a criminal history category of IV, to be 188-235 months, and therefore concluded that the agreed sentence of 228 months was consistent with the guidelines. The PSR determined that there were no factors warranting departure.

On April 9, the government filed its objects to this PSR, complaining that some of the PSR's calculations of Carrozza's offense level were too high and some were too low. The key objection made by the government was that the PSR should have made an upward adjustment pursuant to U.S.S.G. §3B1.1(a) for Carrozza's role as an organizer or leader in several of the offenses charged. The

government calculated the applicable guideline range to be 235-293 months, based upon an offense level of 35 and a criminal history category of IV. Finally, the government argued that there were justifiable factors to support a downward departure.

Carrozza filed several specific objections to the PSR on April 17. Although Carrozza did not discuss the particulars of his own calculation of the applicable guideline range, he did argue that "a downward departure to the agreed upon sentence" was warranted. Carrozza did not dispute the government's calculations as to his role in the offenses charged.

The Addendum to the PSR was completed on April 23. The Addendum accepted some of the government's objections calling for a downward revision in the offense level

calculations, but rejected the government's role in the offense objection because the government had not provided "sufficient information...in the detail of the particular episodes to delineate the individual roles of the defendant within those episodes." The Addendum recalculated the total offense level to be 31, yielding a guideline range of 151-199 months. The Addendum noted that this range would require "an upward departure if the Court were to sentence the defendant to the amount of time designated in the plea agreement [228 months]."

On the same day that the Addendum to the PSR was disclosed, the government and Carrozza filed separate sentencing memoranda, each arguing to the court that the agreed upon sentence constituted a justifiable downward departure.

The sentencing hearing was held on April 29, 1992. At the outset of the sentencing hearing, the court explained that under Rule 11(e)(1)(C), it could either accept the plea agreements and impose the agreed-upon sentence in each case, or reject the agreements and offer the defendants an opportunity to withdraw their pleas. The court clearly articulated the disparate guideline ranges calculated by the government and the probation office and then stated:

> I think the most sensible think to do is to not resolve that dispute but to decide whether the 228-month sentence, which I thing is about 19 years, if it is, indeed, an eight-month downward departure as the Government intends, is appropriate....
>
> Well, I am going to proceed ... in the following fashion: I am not deciding whether the Guidelines are 151 months to 188 months or [if] Probation's calculation is followed, which would involve 40-month upward departure or whether, as the Government contends, that Mr. Carrozza has assumed up to now, [or] at lease up to the time of his plea,

> the calculations might be 235 to 293 months.
>
> I am going to analyze this in the context of the question being whether - if the Guidelines are 235 [to] 293 months, the seven-month downward departure to 228 months [as] called for by the plea agreement is justifiable.

The court explained that it was not resolving the dispute because Fed. R. Crim. 32 does not require resolution of issues that will not be material to the sentence to be imposed.

When asked if anyone objected to this procedure, the parties responded "no." Consistent with their prehearing positions, both Carrozza and the government argued that the agreed upon sentence represented a justifiable downward departure from the applicable guideline range.

The court thereafter sentenced Carrozza to 228 months imprisonment, to be followed by 60 months supervised

release. On the same day, the district court entered an order relating to the presentence reports. In this order, the court stated that one of the justifications for its downward departures for several of the defendants was that the departures "eliminated the need for both a lengthy trial (which it was estimated would take six months to a year) and for protracted sentencing hearings to resolve disputes relevant to the term of incarceration to be imposed on each defendant."

On April 30, 1992, the court entered its "Second Order Relating to Presentence Report" in Carrozza's case. In that order, the court expressly relied on Fed. R. Crim. P. 32(c)(3)(D)(ii) as its justification for failing to calculate the sentencing guideline range applicable to Carrozza:

> With regard to the government's objections to the PSR, the court, pursuant to Fed. R. Crim. P. 32(c)(3)(D)(ii), did not decide whether the applicable Sentencing Guidelines were 235 to 293 months as asserted by the government or 151 to 188 months as recommended by the Probation Officer. Rather, the court assumed the Sentencing Guidelines were a minimum of 235 months and agreed with the government and the defendant that if the binding plea agreement, pursuant to Fed. R. Crim. P. 11(c)(1)(C) [sic], calling for a sentence of 228 months represented a departure, there were justifiable reasons for it. Thus, the agreed-upon 228 month sentence was imposed.
>
> Judgment was entered on May 1, 1992.

Notwithstanding the court's previous assertions that it was merely "assuming" that the government was correct, the judgment indicates that the court found the guidelines range to be 235-293 months and imposed a downward departure for justifiable reasons. In a May 7, 1992 memorandum explaining its sentence, the court once again stated its basic assumption:

In the Presentence Report, the Probation Department calculated Carrozza's Sentencing Guidelines to 151 to 188 months. The government, however, contended that the proper calculation of Carrozza's Sentencing Guidelines was 235 to 293 months. Carrozza's plea agreement specified a sentence of 228 months, or 19 years, in prison. The court analyzed his plea agreement on the assumption that the required sentence represented a seven month downward departure.

On appeal, Carrozza contends that the sentencing procedure employed by the district court was patently unlawful because the court failed to determine the applicable guideline range.

A. Plain Error Standard[12]

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[12] In its jurisdictional statement, the government questions whether this court has jurisdiction over the instant appeal. The government notes that a defendant may only appeal a sentence pursuant to a Rule 11(e)(1)(C) plea agreement on the grounds that the sentence was imposed in violation of law or as a result of an incorrect application of the guidelines. 18 U.S.C. §3742(c). In his jurisdictional statement, Carrozza asserts only that the sentence was in violation of the law. Because Carrozza provides no authority for the proposition that a claim such as

Carrozza concedes that because he failed to object to the district court's course of conduct during the sentencing hearing, his sentence can be reversed only upon a showing of plain error. See Fed. R. Crim. P. 52(b). Carrozza has failed to make such a showing here.

The Supreme Court recently interpreted the plain error rule in United States v. Olano, 113 S. Ct. 1770

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he raises of procedural error in determining a sentence may rise to the level of a claim that the resulting sentence was imposed in violation of the law, the government argues that this court is without jurisdiction to consider the appeal. Regardless whether the district court's error rises to the level of a violation of law, Carrozza clearly argues in his brief that the district court failed to apply the guidelines correctly when it "assumed" a role in the offense adjustment. That is sufficient to give this court jurisdiction to decide this appeal. See United States v. Smith, 918 F.2d 664, 668-69 (6th Cir. 1990)(upholding the right of a defendant to file a similar appeal under 18 U.S.C. 3742(a)(1) or (a)(2)), cert. denied, 111 S. Ct. 1088(1991).

(1993). In Olano, the Court reiterated the three limitations on appellate authority to recognize errors under Fed. R. Crim. P. 52(b): (1) there must be an "error," (2) the error must be "plain," and (3) the error must "affec[t] substantial rights." Id. at 1777-78. Even if a defendant can establish all three criteria, and appellate court had discretion not to review the error because Rule 52(b) is written in permissive, not mandatory, terms. Id. at 1778. The standard to guide that discretion was stated in United States v. Atkinson, 297 U.S. 157, 160 (1936): appellate courts should correct plain forfeited errors affecting substantial rights if the errors "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Olano, 113 S. Ct. at 1779.

We agree with Carrozza that the district court committed error when it "assumed" that Carrozza's guideline range was 235-293 months prior to its "downward" departure to 228 months. Before accepting a plea agreement that contains a specific sentence under Fed. R. Crim. P. 11(e)(1)(C), a sentencing court is required to satisfy itself either that: "(1) the agreed sentence is within the applicable guideline range; or (2) that the agreed sentence departs from the applicable guideline range for justifiable reasons." U.S.S.G. §6B1.2(c). to determine whether the sentence departs from the applicable guideline range for justifiable reasons, the court must first determine what the applicable guideline range is and then analyze whether a departure is authorized by 18 U.S.C. §3553(b) and the general departure rules in Chapter 1, Part A(4)(b) of the

Guidelines. See U.S.S.G. §6B1.3, Commentary. In effect, §6B1.2(c) instructs courts to apply general guideline principles when determining whether to accept a plea under Fed. R. Crim. P. 11(e)(1)(C). See U.S.S.G. §1B1.1 (general instructions on applying the guidelines).[13]

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[13] The government argues that Carrozza has waived his right to have the district court determine an actual guideline range by expressly agreeing to the district court's decision to assume a guideline range. A deviation from a legal rule is not considered an "error" if that legal rule has been waived, as opposed to merely forfeited. See Olano, 113 S. Ct. at 1777 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.")(internal quotations omitted). We doubt that the sentencing guidelines can be waived. For example, we suspect that an agreement between the government and a defendant not to apply the guidelines would be ineffective. Because of doubts that the sentencing guidelines are waivable, we rest our decision today on Carrozza's failure to establish that the district court's error affects substantial rights, and on our discretion not to recognize plain errors even when they do affect substantial

In sentencing Carrozza, the district court mistakenly believed that Fed. R. Crim. P. 32(c)(3)(D) authorized its decision not to determine an actual guideline range for Carrozza's offenses. As we have stated, this was error. Rule 32(c)(3)(D)[14] apparently relates to factual inaccuracies in a presentence report, not to mixed questions of law and

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rights.

[14] Fed. R. Crim. P. 32(c)(3)(D) provides in pertinent part the following:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Fed. R. Crim. P. 32(c)(3)(D) (emphasis added).

fact that a defendant does not dispute. See United States v. Hand, 913 F.2d 854, 857 (10th Cir. 1990) (defendant's disagreement over PSR's legal conclusion that defendant was not a minor participant does not allege factual inaccuracies in the PSR and does not implicate Rule 32(c)(3)(D)). But see United States v. Rosado-Ubiera, 947 F.2d 644, 646 (2d Cir. 1991) (Rule 32(c)(3)(D) was violated when court failed to resolve the defendant's precise role in the offense).

To be sure, a district court has inherent power not to decide disputes that are immaterial or irrelevant to the ultimate sentence. For example, a sentencing court need not determine whether prior convictions should be added to a defendant's criminal history score if the addition will not affect the defendant criminal history category. See

United States v. Lopez, 923 F.2d 47, 51 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991). We have also held that a sentencing court need not choose between two overlapping guideline ranges when the same sentence would have been imposed under either range. United States v. Ortiz, 966 F.2d 707, 718 (1st Cir. 1992), cert. denied, 113 S. Ct. 1005 (1993); United States v. Bermingham, 855 F.2d 925, 934 (2d Cir. 1988). Here however, the two ranges did not overlap, nor was the sentencing factor immaterial to Carrozza's guideline range. Instead, if the disputed factor was decided in the government's favor, Carrozza's sentencing range would be 235-293 months, but if the issue was decided as the probation office recommended, Carrozza's guideline range would be 151-188 months.

We have also intimated in the past that if a sentencing court intends to

depart, an error in applying the guidelines may prove to be harmless if the court makes clear that it would have departed to the same sentence regardless of the exact guideline range. United States v. Plaza-Garcia, 914 F.2d 345, 347 (1st Cir. 1990). We have never, however, suggested that a sentencing court need not decide a sentencing factor when one decision will result in an upward departure and another in a downward departure. Such a rule would be inimical to the very principle behind guideline departures. United States v. McCall, 915 F.2d 811, 814 n.3 (2d Cir. 1990) (rejecting government's argument that incorrect application of guidelines, resulting in range of 151-188 months instead of 87-108 months, was irrelevant to court's ultimate sentence because court indicated an intent to depart down to substantial cooperation - an

indication that could not be reconciled with court's 108-month sentence, which was at the high end of the correct guideline range).

The district court, therefore, erred when it simply assumed that Carrozza's guideline range was 235-293 months, an ignored the probation office's suggestion that the range should be 151-188 months. And while we can understand and sympathize with the district court's desire to avoid and obtuse decision that may have seemed academic, we think the error was "plain" in the sense that is was both "clear" and "obvious." See Olano, 113 S. Ct. at 1777. That is enough to pass the second hurdle to appellate authority under Rule 52(b).

We now turn to the third and often deciding factor in our plain error analysis - whether the error affects substantial rights. In most cases,

"although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." Olano, 113 S. Ct. at 1778. For several reasons, we think Carrozza has not made such a showing here.

First, Carrozza has not argued, and points to no evidence suggesting, that an actual adjustment for his role in the offense would have been improper. Instead, Carrozza merely assumes that the district court's "assumption" was in fact wrong, and argues that he was prejudiced because his actual guideline range might have been years shorter than that assumed by the district court. However, analysis of the record reveals that, in all likelihood, the district court's assumption that Carrozza's base offense level was 35 was correct.

The difference between the government's and the probation office's calculations of Carrozza's base offense level resulted entirely from whether or not an upward adjustment should have been given for Carrozza's role in the drug conspiracy. The probation office assigned a level 26 to Carrozza's drug trafficking activity. The government argued that this level should be increased by four levels to 30 because the activity involved more than five participants. See U.S.S.G. §3B1.1(a). Because Carrozza's narcotics activities yielded the highest offense level among Carrozza's various offense and, therefore, served as a starting point for the multiple count analysis under U.S.S.G. §3D1.4, the difference was crucial. Applying the multiple count analysis, both the probation office and the government added five levels - the

probation office arriving at a total offense level 31 and a guideline range of 151-188 months, and the government calculating a total offense level 35 and a guideline range of 235-293 months.

The probation office rejected the government request for a role in the offense adjustment for any of Carrozza's offenses, contending that there was insufficient evidence as to Carrozza's role in the individual offenses to make such a determination. While the specifics with regard to Carrozza's role in his bookmaking and extortion offenses are rather sketchy, the government provided more than sufficient evidence that Carrozza directed the narcotics activities of five or more participants. The government's 104-page factual submission to the probation office is replete with evidence that Carrozza directed and organized the drug

trafficking conspiracy. Given this evidence, it is understandable why Carrozza completely neglected to argue the propriety of a role in the offense adjustment in his appellate brief and below. Since it is Carrozza's burden to establish that the district court's error affected substantial rights, his failure to argue that a four-level role in the offense adjustment would have been improper, combined with the fact that an adjustment would have been appropriate at least with respect to the crucial narcotics conspiracy, undermines Carrozza's claim of prejudice.

To be sure, a role in the offense adjustment is a mixed question of law and fact. In most instances, an appellate court will not examine such questions in the first instance. We make the analysis only to indicate the unlikelihood that

Carrozza was prejudiced by the district court's failure to decide the issue.

A further reason for finding no error affecting substantial rights is the significant benefits Carrozza received in exchange for his plea of guilty. In exchange for Carrozza's agreement to a 228-month sentence, the government promised not to prosecute Carrozza for his alleged involvement in the murder of William Grasso - an offense that could carry a sentence of life imprisonment - and the attempted murder of Frank Salemme, Sr. In addition, the government promised not to subpoena Carrozza to testify in any federal grand jury investigation in the District of Massachusetts relating to the activities of the Patriarca Family. This latter promise was probably significant to Carrozza, who, as a made member of the Patriarca Family, had taken the oath of

"omerta" to protect the secrets of the Patriarca Family of La Cosa Nostra to his grave. In light of the significant benefits Carrozza received from the plea agreement, it is difficult to see how he was prejudiced by the district court's acceptance of his plea and sentencing him to a term of imprisonment upon which he had specifically agreed. See United Stats v. Ybabez, 919 F.2d 508, 510 (8th Cir. 1990)("We do not discern a miscarriage of justice when a defendant receives the sentence he bargained for in a plea agreement."), cert. denied, 111 S. Ct. 1398 (1991).

Finally, even if Carrozza were able to establish some form of prejudice from the district court's failure to address his role in the offense and thereby pass the third and final hurdle of appellate authority under Fed. R. Crim. P. 52(b), the case would be an inappropriate one

for us to exercise our discretion to recognize plain forfeited errors affecting substantial rights only if the errors "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). We see no such serious effect here. Carrozza failed to object in circumstances strongly indicative that he wished to accept the compromise sentence because of the benefits it conferred. The attendant circumstances do not reflect discreditably upon the fairness, integrity or public reputation of the proceeding.

We vacate Patriarca's sentence and remand for resentencing in accordance with this opinion. Carrozza's sentence is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2213

UNITED STATES OF AMERICA,

Appellant,

v.

RAYMOND J. PATRIARCA,

Defendant, Appellee.

BEFORE

BREYER, Chief Judge,
CAMPBELL, Senior Circuit Judge,
TORRUELLA, SELYA, CYR, BOUDIN AND STAHL,
Circuit Judges,

ORDER OF COURT

Entered: November 22, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk

FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1350

In the Supreme Court of the United States

OCTOBER TERM, 1993

RAYMOND J. PATRIARCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of sentencing for a RICO offense, "relevant conduct" may include uncharged racketeering acts committed by the defendant, or racketeering acts, charged or uncharged, committed by other members of the RICO enterprise.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 111 S. Ct. 1854 (1991)	12
United States v. *Frederick*, 897 F.2d 490 (10th Cir. 1990)	8
United States v. *Galloway*, 976 F.2d 414 (8th Cir. 1992), cert. denied, 113 S. Ct. 1420 (1993)	8
United States v. *Glecier*, 923 F.2d 496 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991)	8
United States v. *Masters*, 978 F.2d 281 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993)	7
United States v. *Miller*, 910 F.2d 1321 (6th Cir. 1990)	8
United States v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 940 (1986)	10
United States v. *Phillips*, 874 F.2d 123 (3d Cir. 1989)	8

Statutes and regulations:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:	
18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2
18 U.S.C. 371	2
18 U.S.C. 1952	2
Sentencing Guidelines:	
§ 1B1.2	10, 11
§ 1B1.2, Application Note 1	10
§ 1B1.2, Application Note 5	10, 11

Regulations—Continued: Page

§ 1B1.2(d) 10, 11
§ 1B1.3 ..... 3, 5, 8
§ 1B1.3, Commentary 8, 12
§ 1B1.3, Application Note 2 8
§ 1B1.3(a) 7, 9
§ 1B1.3(a)(1) 5
§ 1B1.3(a)(1)(B) 5, 7
§ 2E1.1 ..... 5, 7
§ 2E1.1(a)(1) 8
§ 2E1.1(a)(2) 9
§ 3B1.2 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A91) is reported at 4 F.3d 70. The opinion of the district court is reported at 807 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1993. A petition for rehearing was denied on November 22, 1993. Pet. App. A92. The petition for a writ of certiorari was filed on February 22, 1994 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); one count of committing a substantive RICO offense, in violation of 18 U.S.C. 1962(c); four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to 97 months' imprisonment, to be followed by three years' supervised release, and he was fined $50,000. He was also ordered to pay $122,344 toward the cost of his incarceration, and $3,954 toward the cost of his supervision. The court of appeals vacated his sentence and remanded for resentencing. Pet. App. A1-A91.

1. The RICO charges in the indictment identified petitioner as the boss and ultimate supervisor of the Patriarca Family of La Cosa Nostra, a nationwide criminal organization. The indictment alleged that the Patriarca Family, named as the RICO enterprise, acted in conformity with the rules of La Cosa Nostra, including the requirement that members commit murder and other criminal acts at the direction of their superiors. The indictment stated that the Patriarca Family engaged in extortion, narcotics trafficking, loansharking, gambling, and murder. Pet. App. A6-A7.

The RICO counts alleged the commission of a total of 68 predicate acts, most of them by defendants other than petitioner. Petitioner was charged with personally committing five predicate acts consisting of violations of the Travel Act, four of which were also charged against petitioner as substantive counts in the indictment. Pet. App. A7.

2. Petitioner pleaded guilty without having entered into any plea agreement with the government. At sentencing, the government asked the district court, pursuant to Guidelines § 1B1.3, to consider seven instances of "relevant conduct," along with the charged conduct, in determining petitioner's base offense level for his RICO offenses. Those instances were: (1) petitioner's involvement in the drug trafficking of his associate Salvatore Michael Caruana; (2) petitioner's efforts to harbor Caruana as a fugitive; (3) the murder of Vincent James Limoli, which was committed by one of petitioner's co-defendants; (4) the murder of Theodore Berns, which was committed by Caruana purportedly because Berns was involved with Caruana's wife; (5) the narcotics activity charged against co-defendant Robert Carrozza; (6) petitioner's alleged authorization of an attempt to murder Vincent Ferrara; and (7) the harboring of La Cosa Nostra member Alphonse Persico while Persico was a fugitive from justice. Pet. App. A8-A9.

Of the seven acts relied on by the government, only the Limoli murder and Carrozza's drug trafficking were mentioned in the indictment; they were charged as predicate acts against petitioner's co-defendants but not against petitioner. The government acknowledged that petitioner had direct personal involvement

only in the Caruana drug trafficking and the harboring of Caruana as a fugitive. The government argued, however, that all seven activities qualified as relevant conduct for purposes of sentencing petitioner under the Sentencing Guidelines, because they were reasonably foreseeable by him, and were committed during and in furtherance of the RICO conspiracy after he joined it as boss in July 1984. Pet. App. A6, A9-A10.

The government asserted that holding petitioner responsible for the Limoli or the Berns murder would increase his base offense level to 43, but that this level should then be reduced to 40 because petitioner's role was minimal or minor under Guidelines § 3B1.2. With petitioner's criminal history category of I, an offense level of 40 called for a prison term of 292 to 365 months. Pet. App. A10-A11.

3. After numerous evidentiary hearings, the district court sentenced petitioner to 97 months' imprisonment, including an upward departure based on petitioner's acts of aiding and abetting Caruana's drug offenses. In so doing, the court held that relevant conduct in a RICO case is limited to the specific predicate acts charged against the defendant and conduct relating to the charged predicates. Accordingly, the court declined to hold petitioner accountable either for the racketeering acts committed by his co-conspirators in furtherance of the RICO conspiracy, or for uncharged predicate acts in which petitioner directly participated. Pet. App. A11-A15.

4. On appeal, the government challenged the district court's holding that relevant conduct for purposes of petitioner's sentence on the RICO counts was limited to the predicate Travel Act offenses

charged against him and conduct relating to those offenses. The court of appeals agreed with the government, concluding that relevant conduct in a RICO case includes the underlying predicate acts, whether charged or uncharged, committed either by the defendant himself or, if the defendant could reasonably foresee the acts, by other members of the RICO enterprise. Pet. App. A16.

The court of appeals reasoned that the base offense level for a RICO offense is to be determined on the basis of "relevant conduct" as that term is described in Guidelines § 1B1.3(a)(1). Pet. App. A19. The court observed that Section 1B1.3(a)(1)(B) states that "in the case of jointly undertaken criminal activity," such as petitioner's RICO enterprise, relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Pet. App. A20. The court therefore concluded that petitioner "is potentially liable for the foreseeable criminal acts of others in furtherance of th[e] enterprise even though he did not personally participate in them." *Id.* at A20-A21. The court also held that relevant conduct may include predicate acts committed in furtherance of the enterprise even if they are not charged in the indictment. In so holding, the court relied on the background commentary to Section 1B1.3, which states that conduct that is not formally charged "may enter into the determination of the applicable guideline sentencing range." Pet. App. A27.

The court of appeals declined to read Guidelines § 2E1.1, which sets the offense level for a RICO violation at the greater of 19 or the offense level applicable to "the underlying racketeering activity,"

as limiting the relevant conduct for a RICO offense. Pet. App. A26-A30. The court explained that the term "underlying racketeering activity" does not refer only to the predicate acts charged against the defendant personally, but to "any act, whether or not charged against defendant personally, that qualifies as a RICO predicate act under [the RICO statute]." *Id.* at A28-A29. The court then concluded that "the acts of relevant conduct proffered by the government, all of which are racketeering acts that could have been charged as predicate offenses, come under the heading of 'relevant conduct' for sentencing [petitioner] on the RICO counts * * *, provided they otherwise meet the * * * standards of [Section] 1B1.3(a)(1)(B)." Pet. App. A29, A30.

Accordingly, the court vacated petitioner's sentence and remanded the case to the district court for a determination "(1) [of] the scope of the joint criminal activity explicitly or implicitly agreed to by [petitioner] jointly with others; (2) whether the criminal acts proffered as relevant conduct were in furtherance of this jointly undertaken criminal activity; and (3) whether the proffered acts were reasonably foreseeable in connection with that criminal activity." Pet. App. A25.

ARGUMENT

Petitioner contends that the seven acts proffered by the government do not qualify as "relevant conduct" under the Guidelines, because relevant conduct is limited to racketeering acts specifically charged against the defendant in the RICO counts. As an initial matter, petitioner's claim is not ripe for review by this Court. Petitioner's claim goes solely to his

sentence. There is no sentence to review, however, because the court of appeals remanded the case to the district court for resentencing. The district court may make factual determinations favorable to petitioner on remand, and it therefore may decline to enhance his sentence based on the seven acts proffered by the government. And even if the government prevails on all factual issues on remand, the sentence imposed will be subject to appropriate review by the court of appeals. In any event, the decision of the court of appeals is correct and, as petitioner concedes (Pet. 23-24), does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is unwarranted.

1. The "relevant conduct" provision, Guidelines § 1B1.3(a), states, in pertinent part, that, unless otherwise specified, its provisions shall apply in determining (1) "the base offense level where the guideline [for the offense conduct] specifies more than one base offense level," and (2) "cross references in Chapter Two." The provision governing RICO offenses, Guidelines § 2E1.1, specifies more than one base offense level and it includes a cross-reference to "the offense level applicable to the underlying racketeering activity." See *United States* v. *Masters*, 978 F.2d 281, 284 (7th Cir. 1992) (reference to "underlying racketeering activity" is a cross-reference), cert. denied, 113 S. Ct. 2333 (1993). Accordingly, Section 1B1.3(a) requires the base offense level for a RICO offense to be determined on the basis of "relevant conduct" as defined in that Section.

Section 1B1.3(a)(1)(B) states that "in the case of a jointly undertaken criminal activity," relevant conduct includes "all reasonably foreseeable acts and

omissions of others in furtherance of the jointly undertaken criminal activity." See also Guidelines § 1B1.3 Commentary (Application Note 2). "[J]ointly undertaken criminal activity" is defined as "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." *Ibid.* As the court of appeals correctly held, "[h]ere, the RICO enterprise—the Patriarca Family—was a 'jointly undertaken criminal activity.' " Pet. App. A20. Thus, under the relevant conduct Guideline, petitioner may be held accountable for the foreseeable racketeering activity of his cohorts in furtherance of the RICO enterprise.

In addition, the conduct for which petitioner may be held accountable in sentencing, whether committed by a cohort or by petitioner personally, need not have been charged in the indictment. The background commentary to Section 1B1.3 makes clear that "[c]onduct that is not formally charged * * * may enter into the determination of the applicable guideline sentencing range." See also, *e.g.*, *United States* v. *Galloway*, 976 F.2d 414, 424 n.6 (8th Cir. 1992), cert. denied, 113 S. Ct. 1420 (1993); *United States* v. *Miller*, 910 F.2d 1321, 1327 (6th Cir. 1990); *United States* v. *Frederick*, 897 F.2d 490 (10th Cir. 1990).[1]

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[1] In some circuits, an indictment charging a RICO conspiracy need not allege specific predicate acts. See *United States* v. *Glecier*, 923 F.2d 496, 501 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991); *United States* v. *Phillips*, 874 F.2d 123, 127-128 (3d Cir. 1989). If in sentencing a defendant for RICO conspiracy such courts were not permitted to consider uncharged predicate acts, they would be limited to the base offense level of 19, as specified in Section 2E1.1(a)(1), even where the conduct

To be sure, the relevant conduct Guideline would not apply to RICO sentences if the RICO Guideline so specified. See Guidelines § 1B1.3(a) (relevant conduct Guideline applies unless "otherwise specified"). But nothing in the RICO Guideline suggests that relevant conduct should be limited to predicate acts charged against the defendant in the indictment. Contrary to petitioner's submission (Pet. 40), the term "underlying racketeering activity" in Guidelines § 2E1.1(a)(2) contains no such limitation; the term is broad enough to cover both charged and uncharged racketeering acts, and racketeering acts committed either by the defendant himself or his cohorts. As the court of appeals correctly concluded, the term "underlying racketeering activity," when read in conjunction with the relevant conduct Guideline, "means simply any act, whether or not charged against [the] defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. §1961(1) and is otherwise relevant conduct under §1B1.3." Pet. App. A28-A29 (footnote omitted).

In short, the court of appeals was correct in holding that, in determining a defendant's base offense level for a RICO violation, the district court may hold him accountable not only for the predicate acts alleged against him in the indictment, but also for (1) any uncharged predicate acts he committed in furtherance of the RICO enterprise and (2) any foreseeable predicate acts, whether charged or uncharged, committed in furtherance of the enterprise by its other members.

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underlying the conspiracy was much more serious than other level 19 offenses. See Pet. App. A28.

2. In support of his position, petitioner argues (Pet. 36-44) that RICO is a multiple-object offense subject to Guidelines § 1B1.2(d), which provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Petitioner then invokes Application Notes 1 and 5 of Section 1B1.2 for the proposition that the term "underlying racketeering activity" in the RICO Guideline refers to predicate acts specifically alleged against the defendant in the indictment.

Section 1B1.2(d) is not applicable here. By its terms, that Section is limited to "count[s] charging a conspiracy." It therefore does not apply to the substantive RICO count, because a substantive RICO count does not charge a conspiracy. Although the RICO conspiracy count does obviously charge a conspiracy, the charged conspiracy had only a single object—the commission of a pattern of racketeering activity in furtherance of the enterprise. See *United States* v. *Neapolitan*, 791 F.2d 489, 496 (7th Cir.) ("The goal of a RICO conspiracy * * * is a violation of RICO."), cert. denied, 479 U.S. 940 (1986). Section 1B1.2(d), by contrast, is addressed to the problem of sentencing for multiple-object conspiracies.

Nor is petitioner helped by Application Notes 1 and 5 of Section 1B1.2. Note 1 provides in pertinent part that when a particular statute proscribes a variety of conduct covered by different Guidelines, the court should determine the applicable Guideline based on the nature of the offense conduct "charged in the count of which the defendant was convicted." As the court of appeals explained, "[i]t is clear * * * that the

note is meant to guide courts in the initial selection of the applicable guideline in Chapter Two * * *. There is no question here that the applicable guideline for RICO convictions is §2E1.1." Pet. App. A31. Nothing in the note limits relevant conduct in a RICO case to charged predicate acts.

Note 5 of Section 1B1.2 provides that in cases in which the verdict does not establish which offense was the object of a charged multiple-object conspiracy, the court should apply subsection (d) of that Section with respect to an object offense "alleged in the conspiracy count" only if the court would convict the defendant of conspiring to commit that offense were it sitting as the trier of fact. Like Section 1B1.2(d) itself, however, Note 5 applies only to sentencing for multiple-object conspiracies. It therefore has no application to petitioner's case.

3. Petitioner also argues (Pet. 44-47) that the Guidelines are closer to a "charge offense" system than a "real offense" system—*i.e.*, courts are generally to look to the count of conviction in determining the applicable Guideline rather than to the specific circumstances of the offense—and that increasing a defendant's sentence for a RICO violation on the basis of uncharged predicate acts ignores that distinction. Although it is true for the most part that courts must sentence by looking initially to the charge of which the defendant was convicted, "real offense principles enter into the punishment prescribed in the guidelines through [among other provisions] the relevant conduct guideline." Pet. App. A44. As in other types of cases, the government's omission in a RICO case to "charge[] and prove[] beyond a reasonable doubt the conduct * * * asserted as relevant conduct does not

prevent the increase in [the] sentence resulting from the relevant conduct guideline." *Id.* at A46.[2]

Contrary to petitioner's contention (Pet. 52-53), the fact that application of real offense principles may impose an additional fact-finding burden on sentencing courts is no reason to ignore the Commission's intention that such principles apply in determining relevant conduct. As the court of appeals observed, "the wide range of crimes covered by RICO may inject new complexities [in determining relevant conduct], but, if so, the remedy lies with the Sentencing Commission." Pet. App. A51. Even if petitioner is correct in claiming that the court of appeals' construction of the Guidelines is inconsistent with the Commission's intent, the Commission is in the best position to make that clear. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

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[2] Petitioner complains (Pet. 47-50) that, as a matter of due process, he should, prior to his guilty plea, have been afforded notice that the government would seek imposition of an enhanced sentence based on relevant conduct not charged in the indictment. Noting that the district court had not addressed that issue at sentencing, the court of appeals declined to decide it in the first instance. Pet. App. A53-A55. Instead, the court of appeals directed the district court to consider the issue on remand if it otherwise determined to increase petitioner's RICO sentence based on the proffered relevant conduct. *Id.* at A55. In those circumstances, the issue of notice is not ripe for review by this Court. We note, however, that prior to petitioner's guilty plea, the government explicitly informed him that it would ask the court to include specific acts of relevant conduct in determining his sentence. See *id.* at A8. The relevant conduct Guideline itself afforded petitioner notice that the relevant conduct the government would proffer could consist of offenses that were not charged in the indictment. See Guidelines § 1B1.3 Commentary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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